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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 48.

UNITED MINE WORKERS OF AMERICA,
Petitioner,

v.

JAMES M. PENNINGTON, RAYMOND E. PHILLIPS and
LILLIAN GOAD PHILLIPS, Admr. of the Estate
of Burse Phillips, Deceased,
Respondents.

On Writ of Certiorari to the United States Court of
Appeals for the Sixth Circuit.

REPLY BRIEF OF RESPONDENTS.

JOHN A. ROWNTREE,
1412 Hamilton Bank Building,
Knoxville, Tennessee,
Attorney for Respondents.

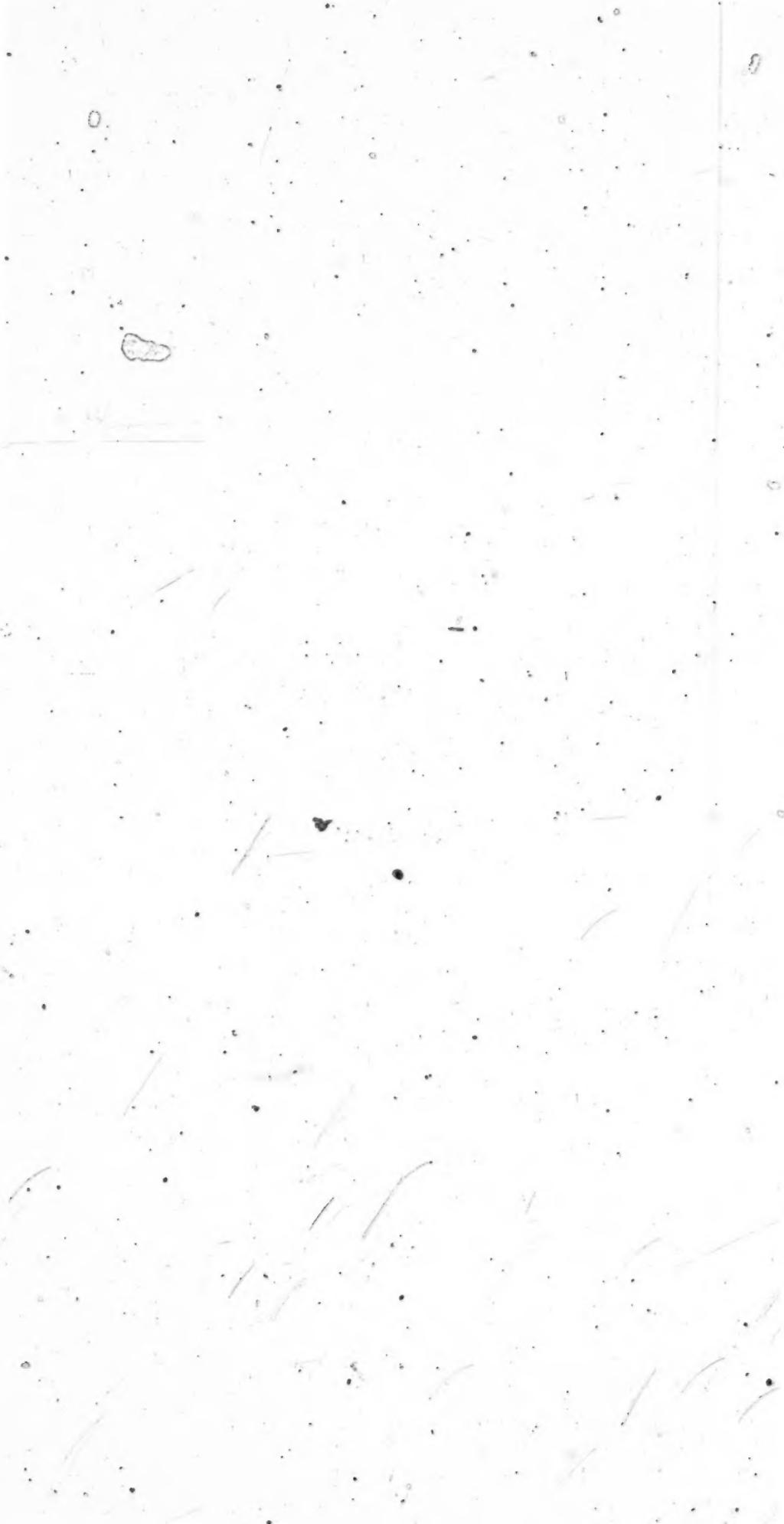


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STATEMENT OF THE CASE.

Respondents (who were partners in Phillips Brothers
Coal Company and who will be referred to herein as "Phil-
lips") accept the statements of Petitioner (herein referred

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to as "UMW") as to the procedural history of the case. It started with a complaint filed by Trustees of United Mine Workers of America Welfare and Retirement Fund against Phillips. Phillips filed the cross-claim against UMW, and this appeal concerns this cross-claim. The claim contained in the original complaint of the Trustees is the subject matter of the petition in case number 39 as to which the Court has not taken action at this time. Both cases involve the same conspiracy, the same case, trial and decisions of lower courts.

COUNTER-STATEMENT OF FACTS.

Phillips cannot accept the statement of facts contained in UMW's brief. Much is omitted. We believe there are direct refutations in the proof of several "facts" which UMW says are "undisputed"; this is true, for instance, with respect to UMW's assertions as to reasons for, and nature of, UMW's investments in coal companies and with respect to denials of conspiracy.

The disjunctive treatment of the various phases of the conspiracy in UMW's brief does not conform to the rule that a conspiracy must be viewed as a whole; the integral parts thereof are not to be weeded out and inquired into separately. *United States v. Patten*, 226 U. S. 525; *Continental Ore Company v. United States*, 370 U. S. 690.

Our version of the facts is rather long. We believe these facts and the fair and reasonable inferences drawn therefrom fully support in every detail our theory of conspiracy. In order that the Court may reach sooner the questions in the case, we present in the next section our theory of conspiracy which was included in the pre-trial order and which was included in the charge to the jury.

Our Counter-Statement of Facts is contained in Appendix I and Appendix II to this brief.

THEORY OF CONSPIRACY.

The exact theory of conspiracy alleged by Phillips, contained in the pre-trial order (49a-56a), and contained in the Trial Court's jury charge (1538a-1543a) is set forth below:

“A. Background of the Conspiracy.

“After World War II the economics of the bituminous coal industry became unstable by reason of the fact that there was more coal being produced than the markets required; before 1950 the major coal producers and the Union were in agreement that the major problem of the industry was over-production and that the growth of small, independent and non-Union producers was contributing to the problem; the major companies and the Union disagreed on how the problem should be handled in the period immediately subsequent to World War II; on its side the Union was contending that the answer was to cut down on the working time of all producers; the UMW urged a three-day work week; for many months before the 1950 contract was signed the UMW took the initiative on this question and directed the working time of the men in the industry, the Union Officials setting on some weeks three-day work weeks and at other times no-day work weeks; domination of the men in the industry was an essential part of the Union's effort to dictate the economics of the industry and this domination was interfered with by the passage of the new Taft-Hartley Act; the Union's efforts to maintain closed shops and maintain a Union controlled Welfare Fund were challenged and in some instances were defeated in the courts by the major coal companies; the major coal companies were opposed to the UMW's dictating the work time of the men in the industry because it cut into their profits.

"B. Formation of the Conspiracy."

"A marked change occurred in the relations between the UMW and the major coal companies in 1950, as disclosed in their bargaining relations before and after that year; the express understanding at the time of the signing of the 1950 National Bituminous Coal Wage Agreement was that the major coal companies, themselves, were to decide on the working time for their employees; this was a surrender on the part of the UMW of its previous policy of seeking to control the economics of the industry by controlling the working time; the understanding was that the problem of stabilizing the economics of the industry, the problem recognized by both the UMW and the major coal companies, was to be taken care of by eliminating the smaller and weaker companies in great numbers, leaving the industry to the major coal companies alone.

"C. Use of the National Bituminous Coal Wage Agreement in the Conspiracy and Evasion of the Taft-Hartley Act."

The conspiracy involved the use of the National Bituminous Coal Wage Agreement of 1950, and its successive amendments as an instrument in accomplishing the purposes of the conspiracy; the accomplishment of the purposes of the conspiracy was furthered by the domination of the UMW over the men in the industry and in 1950, by the express statement of the representatives of the major coal companies the Welfare Fund was turned over to the Union's control and rather than opposing the UMW's efforts to evade the Taft-Hartley Act as they had before, the major coal companies have fostered the UMW's domination of the men of the industry so that the terms of the National Bituminous Coal Wage

Agreement would be imposed upon the small mines; by successive amendments to the uniform National Bituminous Coal Wage Agreement's terms the wage scale and the Welfare Fund royalties per ton were raised to exceedingly high levels; the mechanization program of the major coal companies was to go ahead rapidly and the successive increases in the wage scale and Welfare Fund payments were designed and tailored to meet the abilities of the major coal companies to mechanize and not have their profits affected by the increasing labor costs if the successive amendments; the successive amendments to the labor contract were made after careful consideration of the abilities of the major coal companies to make the increases without affecting their profits, the Union had no concern as to whether the weaker companies could pay; the UMW displayed its knowledge that the weaker companies could not pay and that they would fall by the wayside by reason of the increased terms; the Union favored the taking over of the industry by the combines of coal producers and the Union worked toward this end; the campaign to impose the wage contracts upon the smaller, independent and non-Union mines was intense after 1950; in areas of strong resistance mobs and terrorism were used; the Trustees of the Welfare Fund stood by as pensioners under the Welfare Fund were organized into bands which had as their purpose the imposition of the uniform National Bituminous Coal Wage Agreement upon the smaller and non-Union companies; the paying of Welfare Fund benefits to men in the industry depended upon the retention of membership in good standing in the UMW, certified to by local, District and International Union Officials; the enticement of benefits under this Fund was held out to the men in the industry as being under UMW control; the finances

of the Union and the finances of the major coal companies have been used to further the drive to bring all production under the National Bituminous Coal Wage Agreement; one or more major coal companies have assisted in crushing the opposition of the principal competitor of the UMW in the bituminous coal labor fields; the result of this conspiracy and these activities has been that large numbers of small companies have been driven out of the industry and that thousands of men in the industry have been driven into unemployment; when these men are put out of the industry they cease to participate in Welfare Fund benefits and the Fund remains as a source of benefit for the employees only of those companies that survive.

“D. Use of Boycotts.”

“To accelerate the demise of the smaller companies devices were inserted into later amendments of the National Bituminous Coal Wage Agreement to further restrain their trade; companies which could not afford to pay the wage scale in terms of the contract were barred from operating on the lands of signatories to the contract; the major companies have acquired great tracts of the coal lands of the country and there is little good coal land left for the small companies to operate upon; the small companies were prohibited from selling coal to the signatories to the contract, including the major companies which supplied coal to the large markets under large contracts.

“E. The TVA Market.”

“The development of the Tennessee Valley Authority as the principal coal purchaser of the entire country called the attention of the conspirators to the Southern Appalachian region when TVA opened up many of its coal-using generating units in 1954,

1955 and 1956; in 1955 the conspirators manifested their intent and purpose to take over the TVA market by working together with the Secretary of Labor to obtain a determination of a minimum wage in the bituminous coal industry under the Walsh-Healey Act; the purpose was to drive out of the government market, particularly the TVA market, the small coal producers; this determination imposed a wage rate upon a producer of coal supplying coal to a government market twice as high as the wage rate determined by the Secretary of Labor in any other industry; in accordance with this design this determination of a minimum wage effectively barred Phillips Brothers from participating in the term market of the TVA because they could not pay the kind of wages set forth in that determination; because contracts for less than \$10,000.00 were exempted from the minimum wage determination, Phillips Brothers was able to ship coal on TVA spot orders; the conspirators set about to eliminate or drastically reduce the spot market of TVA; when this effort failed to bring results the conspirators adopted the practice of predatory pricing to drive the spot coal market price down to a price which a small producer could not meet at a profit; in this phase of the campaign the West Kentucky Coal Company and its subsidiary, Nashville Coal Company, took the most prominent part; the Union had over \$25,000,000.00 of risk capital invested in these companies; large amounts of tonnage were dumped upon the spot coal market of TVA at constantly reduced prices; the spot coal price was beaten down to such extent that Phillips Brothers suffered large losses in trying to retain their position in that market and finally had to abandon their sale of coal to that market and it became necessary for them to abandon the partnership business.

"F. Enforcement of the National Bituminous Coal Wage Agreement."

"Companies which survived the other onslaughts of the conspiracy have been killed off by such lawsuits as this brought by the Trustees of the Welfare Fund; prior to 1958 some three or four cases were brought by the Trustees against some of the larger producers in the area; cases against the smaller producers were commenced in 1958 and the following period; some forty-one of these cases have been brought and are presently pending against the small companies of the area in the State of Tennessee since January 1, 1958; the amount sued for by the Trustees exceeds the combined profits of the company for its entire life.

"The Union in carrying on the foregoing activities pursuant to its understanding and agreement with the major coal companies was not acting alone to further its own interests as an organization of wage earners but was aiding, abetting and cooperating with business men in an effort to restrain trade of small coal companies and to monopolize the industry for the major coal companies; the conspiracy involved boycotts and a purpose to stabilize the prices of coal in the industry; the practices used pursuant to the conspiracy particularly the imposition of the constantly increasing terms of the National Bituminous Coal Wage Agreement upon the small coal companies, such as that of Phillips Brothers, and the price-cutting practices of the conspirators on the markets supplied by Phillips Brothers were unreasonable.

"G. Enforcement of the National Bituminous Coal Wage Agreement Against Phillips Brothers."

"A central part of the understanding and agreement among the alleged conspirators to stabilize prices

in the industry, to restrain competition and to monopolize was that the terms of the National Bituminous Coal Wage Agreement would be imposed upon the smaller and financially weaker coal companies with the knowledge and the intent that these companies in large numbers would go out of business because they could not keep pace with the increasingly higher wage and welfare terms which were designed to meet the ability of the large combines to pay as the mechanization program of the latter progressed; the use of the National Bituminous Coal Wage Agreement against the small companies for the purpose of driving them and their employees out of the industry could not be achieved if the employees of these small companies were allowed to exercise the right afforded them by the Labor Statutes; the purposes of the conspiracy were effectuated by the major coal companies permitting the UMW to assume a dominating role over the labor force in the coal fields by evasion of the Labor Statutes which protected the rights of the employees of small companies to join a Union or refrain from joining a Union and to select their own bargaining representatives and which Statutes forbid Unions from dominating Welfare Funds; thereby and pursuant to the intent of the alleged conspirators the employees of the small companies have been deprived of any real choice as to whether they will be represented by the Union or not and whether their bargaining agreement with their employers will be on such a basis that their employers can stay in business and their jobs can be preserved; the effective use of the National Bituminous Coal Wage Agreement to destroy small coal companies and the evasion of the Labor Law is shown by this case brought by the Trustees and by the circumstances of the making of the contract sued on here by the Trustees; in this

regard the UMW completely ignored the employees of Phillips Brothers and having no authority from those employees and without having them as members and without their knowledge the UMW extracted the signing of a copy of the National Bituminous Coal Wage Agreement from Phillips Brothers; several months thereafter and before the employers knew of or had ratified the contract and with the use of mobs and in an atmosphere of coercion directed against the company and its employees, the Union Shop Clause of the contract was enforced by the UMW and the employees were required to join the UMW in order to go back to work; they were not given benefit cards under the Welfare Fund until they did join the Union; it was only under these circumstances that the UMW received any authority or right to act as bargaining representative of the employees of Phillips Brothers."

ARGUMENT.

Phillips cannot practically make a paragraph by paragraph reply to the several briefs filed against it by UMW, AFL-CIO and BCOA. We intend rather to state what we conceive to be the questions raised in those briefs and set forth our position on those questions.

It appears that the arguments of the opposing briefs may be summarized as follows:

I. That the judgments below violate the principles found in the existing precedents of this Court dealing with unions under the Sherman Act.

A. That in a Sherman Act case, a defendant union must be excused if one of the purposes of market restraints pursuant to a conspiracy with business groups is to promote otherwise legitimate Union purposes (such as better or uniform wages and better working conditions).

B. That the union will be excused for all activities which represent types of practices approved by the labor statutes (such as collective bargaining, picketing, strikes and boycotts).

II. That prior decisions of this Court are not sound precedents in holding that unions have violated the Sherman Act when they conspire with, and aid, business groups in monopolizing, and restraining trade in, markets for goods; and that this is particularly true since the passage of the Taft-Hartley and Landrum-Griffin Acts.

III. That certain phases of a conspiracy in restraint of trade (such as dealing with officers and agents having responsibilities in the buying of goods for the Government) should be excluded from the evidence in a Sherman Act case.

IV. That where there are denials of conspiracy by the alleged conspirators a Sherman Act jury verdict must be set aside where there is no direct evidence of the specific agreement alleged to have been made by the conspirators, regardless of the strength of circumstantial evidence and inferences; and that this is particularly true under the Norris-LaGuardia "clear proof" rule where a labor union is a defendant.

These propositions will be considered in the above order.

I. The Judgment Below Is Supported by Prior Decisions of This Court.

A. The Unlawful Purpose of a Union to Aid Business Groups in Restraining Trade and Attempting to Monopolize Markets Is Not Cured by Any Co-Existing Purpose to Serve Legitimate Union Ends; the Purposes in This Case Were Like Those in Allen Bradley and Carpenters.

As this Court has previously said in a Sherman Act case involving a labor union, there must be a reconciliation of two declared congressional policies. One of these policies seeks to preserve a competitive business economy. The other policy seeks to preserve the rights of labor to organize to better the conditions of employees through the agency of collective bargaining. The Court has previously been confronted with the problem of seeking a determination of how far Congress intended activities under one of these policies to neutralize the results envisioned by the other policy. Allen Bradley Co. v. Local Union No. 3, 325 U. S. 805, 806.

Perhaps it is the making of the foregoing reconciliation that has resulted in an emphasis in the decisions involving a labor union under the Sherman Act upon "intent" and "purpose". The intents and the purposes of a labor

union in making agreements with business groups would seem naturally to have significance in making a reconciliation of these congressional policies. The making of agreements that bring about restraints on employers is a common business of labor unions under the congressional policy favoring collective bargaining. However, the cases make it clear that unions may violate the Sherman Act by entering into agreements, combinations and conspiracies with employers where a purpose of the union is to aid business groups in restraining trade in the markets and in attempting to monopolize markets. The cases also make it clear that the unlawful character of the union's conduct in entering these combinations and conspiracies is not cured by a co-existing purpose to further the legitimate ends of organized labor.

It was pointed out by this Court in **Apex Hosiery Company v. Leader**, 310 U. S. 469, 492-493, that the Sherman Act was aimed at trusts and combinations of business and of capital organized and directed to suppress competition in the marketing of goods and services, by restricting production, raising prices or otherwise controlling the market. It was further pointed out in that case (page 495) that this Court has never applied the Sherman Act against a union unless there was some form of restraint upon commercial competition in the marketing of goods or services. Stating that unions are subject to the Act in some respects, this Court found in the **Apex** case (p. 501) that the union involved there was not being used by combinations of those engaged in an industry as the means or instrument of suppressing competition or fixing prices and that the combination did not have as its purpose restraint upon competition in the market. The Court further held in **Apex** (pp. 510-512) that the Sherman Act is violated only when the intent or necessary effect is to enable the conspirators to monopolize the supply, control the price or discriminate as between would be purchasers,

and the Sherman Act would not apply where the conspiracy is not directed at commerce.

In United States v. Hutcheson, 312 U. S. 219, this Court held that the Sherman, Clayton and Norris-LaGuardia Acts are to be read as interlacing statutes, giving a harmonizing text of outlawry of labor conduct. The Court said that where the union acts in its self interest and does not combine with non-labor groups the union exemption would apply.

The Court went on to hold in Hutcheson that the Sherman Act was not violated by the union because its conduct was directed, not at controlling markets, but solely at the obtaining of jobs for which it contended with a rival union.

An illicit combination between a union and business group came before the Court in Allen Bradley Co. v. Local Union No. 3, 325 U. S. 797. The fact that the union had as a purpose the promotion of the legitimate ends of labor in the improvement of conditions of its members was not an excuse when there were also present purposes which violated the Sherman Act. The first paragraph of the opinion states:

“The question presented is whether it is a violation of the Sherman Anti-Trust Act for labor unions and their members, prompted by a desire to get and hold jobs for themselves at good wages and under high working standards, to combine with employers and with manufacturers of goods to restrain competition in, and to monopolize the marketing of, such goods.” (Emphasis supplied.)

The opinion states (page 799) that the aim of the union for many years was to expand its membership and to improve the conditions and employment opportunities of its members and the union realized that to achieve this

purpose the employers of its local members must have the widest possible outlets for their products. Accordingly the union conducted an aggressive campaign to obtain closed shop agreements and expanded this campaign through conventional legal methods of strikes and boycotts. These agreements closed the market to others than the employers of the union members, resulting in more working opportunities, better wages and working conditions. But the union's agreements looked "not merely to terms and conditions of employment but also to price and market control." This control resulted entirely from the foregoing conventional union practices. But the unfairness was a matter of area limitations on those able to share in the market. A careful reading of the case makes it appear strongly that the area restrictions resulted from geographical confinement of the union involved, making the employees of the out of state employers ineligible as members and making closed shop contracts effective in closing the market.

It was said in Allen Bradley at page 801:

"Our problem in this case is, therefore, a very narrow one—do labor unions violate the Sherman Act when, in order to further their own interests as wage earners they aid and abet business men to do the precise things which that Act prohibits?" (Emphasis supplied).

The answer was in the affirmative, even though the union's types of actions came within the exemptions of the Clayton and Norris-LaGuardia Acts (P. 807). The Court stated that Congress never intended that unions could, consistently with the Sherman Act, aid non-labor groups to create business monopolies and to control the marketing of goods and services. The purpose of mutual help by union members could hardly be thought to cover activities for the purpose of employer-help in controlling markets and prices (P. 808). The Court concluded:

"It would be a surprising thing if Congress, in order to prevent a misapplication of that legislation to labor unions, had bestowed upon such unions complete and unreviewable authority to aid business groups to frustrate its primary objective . . . our holding means that the same labor union activities may or may not be in violation of the Sherman Act, dependent upon whether the union acts, alone, or in combination with business groups" (Pp. 809-810).

The decision in **Allen Bradley** was the precedent controlling the Sherman Act question in **United Brotherhood of Carpenters and Joiners v. United States**, 330 U. S. 395. In **Carpenters** the market restrictions arose entirely from conventional union practices the same as in **Allen Bradley**. But unlike **Allen Bradley** the discriminatory restraints which closed the markets resulted from differences in means and methods of production rather than area limitations on eligibility for union membership. The opinion of the Court of Appeals (144 F. 2d 546, 548) shows that the conspiracy involved in **Carpenters** arose out of collective bargaining in 1936 over the union's demand for increase in wages. The employer group acceded to this demand when the bargaining agreements included these increased terms in such amount and in such form that the goods of out-of-state producers would be barred from the market. The reason why the goods of these competitors were barred from the market was because of the great disparity in the means of production between the competing groups, giving the local group an advantage over the other group under the wage scale. A part of the theory in the case at bar is substantially identical, involving the UMW wage scales of 1950 and later years tailored to intensive mechanization in thick seams of coal. The protective wage clause contained in the contracts procured by the Carpenters were substantially identical with the protective wage clause inserted in the later contracts of UMW. It was the wage scale and the disparity

in the means of production in **Carpenters** which brought about the closing of the markets to competitors and the restraining of competition in those markets.

We believe that the decisions in **Carpenters** and **Allen Bradley** must be put together with **Apex** wherein the Court said (P. 503) that the "elimination of price competition based on differences in labor standards, is the objective of any national labor organization." The combined holdings in the cases can only mean that where there is a purpose to aid business groups to control markets and restrain the competition of competitors, the union will not be excused by asserting that a purpose was to improve and make uniform the wage scale, at least in a situation where area limitations on memberships or disparity in means of production give the conspiring business group an unfair and unreasonable advantage. We believe that this meaning has great significance in the case at bar.

This case contains elements of the basic purposes and discriminatory restraints that characterized the combinations in both **Allen Bradley** and **Carpenters**. The differences in the means and methods of production in the coal industry are not disputed. In this respect this case is stronger than **Carpenters** because in the latter it is not clear in the opinions why the outside producers of lumber could not conform their production methods or their wage scale to those in the San Francisco Bay Area. The record in this case makes it clear that Phillips and other small local producers could not possibly conform their production methods and wage scale to those of the conspirators. This involves the proof about differences in the natural conditions of coal seams in the Appalachians, particularly in Tennessee, as compared to other fields.

This case has to do with thousands of people in scores of communities historically tied to the coal industry,

operating in thin seams, in rough terrain, and with no possibility of switching production, based on manpower with small machines and tools, to production, based on gigantic machines operated by a handful of highly skilled men, who, of course, are entitled to be paid according to their skill and productive capacity. But the record concedes that the uniform wage was tailored to fit the latter kind of production. The restraints here are as tight, as neat, as effective, and as unreasonable as in **Carpenters** or **Allen Bradley**. And, the human suffering and frustrations that have resulted in a whole section of this fair country have become a national scandal—all from the negotiations of a handful of men who say their purposes cannot be questioned.

Of course our point is not that UMW has refrained from resisting mechanization; the point which UMW's brief refuses to confront is the clear evidence that UMW is forcing mechanization beyond all possibilities in many areas.

We believe there can be no argument for the proposition that the righteous goal of a union to strive for an industrywide uniform wage scale includes the objective to impose uniform contracts industrywide which render it impossible for employers in whole areas to comply. That which is "uniform" in language of the contract may be extremely "un-uniform" in the hard actualities of geography, geology and economics, without regard to the ingenuities and abilities of competing business men. This should be most clear in a situation where two-thirds of the union's members are forced out of the industry while the union pursues its "uniformity" policy. This certainly is not the normal "objective of any national labor organization". The point is reached where, in all reason and logic, a jury may be asked to decide whether the course of conduct is for the sole purpose of "eliminat-

ing sub-standard wage competition" or for the additional purpose of aiding a business group by driving from the industry large competitive segments not favored by geography, geology or economics.

The principles of the various cases discussed above are still valid and sound. This Court has not modified **Apex**, **Hutcheson**, **Allen Bradley** or **Carpenters** in any later decision. These cases have stood for nearly two decades and have been cited as good law by this Court and by many lower courts up to the present day.

In **United States v. Employing Plasterers Assoc.**, 347 U. S. 186 and 198, it was charged that the union and the plasterers' association acted in concert to suppress competition among local plastering contractors, to prevent out-of-state contractors from doing any business in the Chicago area and to bar entry of new local contractors without approval of an examining board set up by the union. The dissenting opinion in that case indicates that this was accomplished by closed-shop agreements and enforced by slow downs, fines, intimidation and other means. It was argued on behalf of the union that the agreements were made with respect to terms and conditions of employment (98 L. Ed. 622) but it was held that the intention to suppress competition in the building business brought the combination between union and business groups under the Sherman Act.

In **Los Angeles Meat and Provision Drivers' Union, Local 626 v. United States**, 371 U. S. 94, the majority opinion held that the District Court was correct in finding that the combination was between business men and the union and was "to restrain commerce". The majority opinion held that there was no "labor dispute" involved. However, the dissenting opinion of Mr. Justice Douglass reasoned that there were wage competition and economic interrelationships between the peddlers and the union

members and that a "labor dispute" was involved in the effort of the union to improve the compensation of the peddlers. Even so, this opinion shows that the acts of the union came under the Sherman Act prohibitions when acts were committed which overstepped the bounds set by the interlacing Sherman, Clayton and Norris-LaGuardia Acts. It would seem that these unlawful acts would be those discussed in the separate opinion of Mr. Justice Goldberg, wherein it is pointed out that under the union agreements there was a favoring of certain processors in which union members had a direct financial interest. The direct financial interest of UMW in the favored combines of coal producers is a significant part of the case at bar.

The foregoing, and other cases in this area, confirm the concept that generally a union acts from a motivation and purpose to improve the condition of at least some of its members; but such a motivation or purpose does not cut off the question of whether there was a purpose to aid business groups in imposing controls on the markets and restraining competition. These cases show that the former purpose is generally present but if the latter purpose is co-existing, then the Sherman Act applies.

B. The Conspiracy Is Not Made Lawful by Adopting as Part of Its Apparatus the Use of Types of Practices Approved by the Labor Law for Disputes and Collective Bargaining.

The American Tobacco Company cases illustrate the fundamental rule under the Sherman Act that the lawfulness or unlawfulness of the means by which the unlawful conspiracy is carried out is not the question. Every conceivable act which could possibly come within the spirit of purpose of the prohibition of the law, without regard to the garb in which such acts were clothed, are

embraced within the first and second sections of the Sherman Act. **United States v. American Tobacco Company**, 221 U. S. 106. It is not the form of the combination or the particular means used, but the result to be achieved that the statute condemns. It is not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful. Acts done to give effect to the conspiracy may be, within themselves, wholly innocent acts. Yet, if they are part of the sum of the acts which are relied upon to effectuate the conspiracy which the statute forbids, they come within its prohibition. **American Tobaeco Co. v. United States**, 328 U. S. 781, 809.

1. Unions Have Been Held to Violate the Sherman Act Where Agreements Pursuant to Collective Bargaining Have Been the Means by Which the Conspiracy Was Made and Effected.

In **Allen Bradley Co. v. Local Union No. 3**, 325 U. S. 797, the Union's part in the conspiracy was effectuated by waging "aggressive campaigns to obtain closed shop agreements with all local electrical equipment manufacturers and contractors. Using conventional labor union methods, such as strikes and boycotts, it gradually obtained more and more closed shop agreements in the New York City area" (P. 799). In the course of time this type of individual employer-employee agreement expanded into industrywide understandings, looking not merely to terms and conditions of employment but also to price and market control (Pp. 799-800). And the Court said (P. 809):

"We may assume that such an agreement standing alone would not have violated the Sherman Act. But it did not stand alone."

The Court went on to make its holding (P. 810):

"... that the same labor union activities may or may not be in violation of the Sherman Act, dependent

upon whether the Union acts alone or in combination with business groups" (Emphasis supplied).

In **United Brotherhood of Carpenters and Joiners v. United States**, 330 U. S. 395, the conspiracy was effectuated by collective bargaining over the wage scale and the inclusion of the protective wage clause in the collective bargaining agreement. This normally might have been lawful conduct on the part of the union and employers but what made it unlawful were the purposes and the circumstances under which the parties acted. The theory of the Government in the **Carpenters** case is expressed in the decision of the Court of Appeals, 144 Fed. 2d 546, 548. In collective bargaining over an increase in wages, the employer group gave the increase when it was accompanied by a protective wage clause which effectively barred the goods of competitors because of the existing difference in means of production which made it impractical for the competitors to pay the same wage scale. The contract was enforced to the mutual advantage of the Union and the employer groups by "acquiescence in the arrangement" (330 U. S. 399). The Union was not successful in its contention "that the agreement between the parties merely embodied legitimate objectives of labor successfully obtained through the process of collective bargaining in termination of a labor dispute" (144 F. 2d 549).

In **United States v. Employing Plasterers' Association**, 347 U. S. 186, the Union used closed-shop agreements to effectuate the purposes of the conspiracy (P. 196).

In **Local 175, Brotherhood of Electrical Workers v. United States**, 219 F. 2d 431, cert. den. 349 U. S. 917, it was the Union's refusal to enter into labor contracts with the competing contractors and the refusal to supply union labor that made the conspiracy effective (219 F. 2d 432).

2. Likewise, Unions Are Not Excused Under the Sherman Act Because They Engage in Traditional Union Types of Activities Such as Organizing, Picketing, Strikes and Boycotts.

In **Allen Bradley** it is shown that the longtime aim of Union that led up to the conspiracy was its campaign to expand its membership (325 U. S. 799). The fact that the Union was in an organizing drive did not excuse the Union under the Sherman Act.

In **United Brotherhood of Carpenters and Joiners**, the collective bargaining agreements that were the basis of the conspiracy were enforced by picketing (330 U. S. 399, and 144 F. 2d 548). In **Local 175 of the International Brotherhood of Electrical Workers**, 219 F. 2d 431, cert. den. 349 U. S. 917, the conspiratorial restraints were carried on by picketing of non-union jobs (219 F. 2d 432-433).

In **Allen Bradley** the Union used strikes and boycotts to obtain the closed shop agreements throughout the area (325 U. S. 799). In **Hunt v. Crumboch**, 325 U. S. 821, the Court said that if the boycott by the Union against the plaintiff had been pursuant to a conspiracy with competitors of the plaintiff, the activities of the Union would have violated the Sherman Act (P. 824). In **Los Angeles Meat and Provision Drivers' Union**, the contracts of the Union were enforced by strikes and boycotts against processors dealing with non-Union peddlers (371 U. S. 97).

Indeed, in **Allen Bradley** the Court recognized (325 U. S. 807) that all of the Union's types of actions came within the exemptions of the Clayton and Norris-LaGuardia Acts, but because there was the combination with the business groups the Sherman Act was violated.

II. The Decisions in Apex, Hutcheson, Allen Bradley and Carpenters Are Precedents Necessary to the Balancing of Dual Congressional Policies. Economic Freedom Requires That These Precedents Not Be Disturbed.

The opposing briefs would look at the problem presented in this case solely from the viewpoint of the labor statutes. As pointed out in Allen Bradley, in this kind of case there needs to be a balancing of two Congressional policies—labor relations and anti-trust.

The anti-trust statutes cannot be crammed into an insignificant and unimportant niche in comparison with the labor statutes. Both fields of legislation are wheels of comparable diameter on the vehicle designed by Congress to travel the highway of free and unburdened commerce. If one is allowed to get much larger and crowd out the other, the vehicle will end up in the ditch.

A review of Apex, Hutcheson, Allen Bradley and Carpenters impresses on the reader the absolute necessity that the trusts and combinations outlawed by the Sherman Act not be allowed to resurrect themselves and prosper by any kind of combination with any kind of group, be it a labor union or whatever. Congress has accepted this interpretation for two decades. The occasional jabs in the opposing briefs at these decisions as being erroneous in the settings in which they were rendered can find no support in precedent, logic or reason.

But the opposing briefs say that since Taft-Hartley and Landrum-Griffin were passed, there is no more room for applying these decisions to the anti-trust laws to labor unions, and that unions are now wholly regulated by the NLRB. Opposing Counsel put reliance upon decisions of this Court dealing with pre-emption of state law by Taft-Hartley. This Court did not take this view in United States v. Employing Plasterers Assoc., 347 U. S. 186, or

in **Los Angeles Meat and Provision Drivers' Union v. United States**, 371 U. S. 94.

We believe the answer to the foregoing contention can be given without resorting to the fact that Landrum-Griffin came after this case.

The whole history of the effect on the anti-trust laws of other statutes, having to do with establishment of regulatory administrative bodies over particular businesses, corporations or associations, puts to rest this contention. Complete exemptions of particular classes of persons, corporations or associations, and partial repeals of the anti-trust laws by implication are not favored and are not lightly to be inferred. See **Silver v. New York Stock Exchange**, 373 U. S. 341, 357; **United States v. Borden Co.**, 308 U. S. 188, 198; **California v. Federal Power Commission**, 369 U. S. 482, 485; **Maryland and Virginia Mills Producers Assoc. v. United States**, 362 U. S. 458, 463; **United States v. Radio Corporation of America**, 358 U. S. 334; and the numerous cases cited in these decisions.

A contrast can be drawn between contentions made by opposing Counsel in this case with the decision in **Pan American Airways v. United States**, 371 U. S. 296. In that case the regulatory statute contained broad anti-trust law exemptions and dealt pervasively in both general and specific language with a number of areas of anti-trust law as it affected the air transportation business, placing regulatory jurisdiction over these areas in the Civil Aeronautics Board. The apparent displacement of anti-trust law was far greater than exists in the labor statutes or the other regulated fields dealt with in the above cited cases. The Court held the air lines were exempted under anti-trust law from these areas covered by the regulatory statute and that the CAB had exclusive jurisdiction in those areas because of the clear meaning of

the statute. But the Court stated that the anti-trust law would still apply to the air lines with respect to any other areas not covered by the "precise ingredients" of the CAB's authority in the regulatory statute (Pp. 304-305).

The reason for the rule in **United States v. Borden Co.**, and the other cases cited above is illustrated by language in the dissenting opinion of Mr. Justice Brennan, concurred in by the Chief Justice, in **Pan American Airways**:

"However questionable the principle that repeals by implication are not favored may be in other contexts, it is entirely sound when dealing with the antitrust laws, and especially the Sherman Act. For this Act embodies perhaps the most basic economic policy of our society, basic and continuing: abhorrence of monopoly. The kind of conduct proscribed by the Sherman Act is simply not such that congressional silence may be interpreted as congressional approval" (Page 324).

The opposing briefs, under this aspect of the case, make reference primarily to the secondary boycott and "hot-cargo" provisions of Taft-Hartley and Landrum-Griffin, pointing out that here is an area of anti-trust law expressly covered by the regulatory statutes. It would appear that these provisions are aimed at boycott activity of the union acting alone in a situation like **Duplex Printing Press Co. v. Deering**, 254 U. S. 443, which kind of activity was taken out from under the anti-trust law by Norris-LaGuardia and the decision in **Hutcheson**, 312 U. S. 219, 231. The language used does not extend to the combination of unions with business groups to aid the latter in restraining competition, and monopolizing markets with the use of boycotts and other means. The labor board is given no adequate means to combat the latter type of dangerous and paralyzing kind of situation, and the expertise of the board is not in the field of combinations of

business, capital and labor in market restraints, and monopolization. The same is true with respect to predatory pricing practices from which Phillips suffered its damage in this case, See **Pan American Airways**, pages 305-306.

The labor statutes themselves do not ascribe to the board any more expertise over boycotts than they do to the courts since the board's jurisdiction is not exclusive and the courts are given jurisdiction in civil damage cases. But the court cases, themselves, arising under labor law secondary boycott have involved unions acting alone, for union purposes, and not seeking to aid business groups to restrain competition and monopolize.

No argument is advanced that Taft-Hartley or Landrum-Griffin deal in any anti-trust area other than boycotts. Under the weight of **United States v. Borden** and the other cases cited above and the long line of related decisions of this Court, it cannot be the rule that a union engaged in the broad anti-trust conspiracy involved in this case is exempted.

A large part of the anti-trust law history deals with long, complex, hard-fought jury cases, where the factual issues were difficult, but the potential effects on large numbers of people were great. This case is no different. And when the opposing briefs argue that unions should not be submitted to trial before "provincial juries" it becomes necessary to point out that the jury has served our system of Justice well, particularly, in the anti-trust field. Juries contain union members, as the jury in this case did.

It is inherent in the jury process, and in the Sherman Act, itself, that the triers of fact listen and give heed to those who say they are injured by the organized combination, and if there is evidence of misuse of tremendous

power for wrongful purposes with tragic consequences to many people, there is no agency better able to make the decision than a Federal Court jury selected from the citizens of all counties in the District. If it is said that the District falls, in part, in the broad area where the effects of the combination have been disastrous, that is exactly what we are pointing out in this brief. A union must expect itself to be finally challenged when its so-called industrywide campaign, "for high uniform wages" benefits some groups in the country (using machines rather than manpower) by letting them take over the markets, but forces large areas of the country out of the industry; and the union must expect that challenge to come where the people have been hurt.

When the opposing briefs say that the verdict here "makes no economic sense", we reply that the jury in the district can best determine that, too. This case arose before any "Appalachian Bill" or "Anti-Poverty Bill", and the inexorable program of eliminating jobs in Appalachia's principal industry continues to give growing concern—now on the national scene. No program of relief can supplant the necessity that the people themselves must work out of their dilemma, and this is impossible when the forces of this conspiracy, from all different directions, effect all sorts of artificial ways to stop the workers; by force of mobs, who are financially supported and enticed by cruel and bogus promises; by financing adjacent, large, mechanized competitors as "fighting ships" to use predatory practices to strip away the markets; by the pretense in the Walsh-Healey wage determination that coal is entitled to twice the wage of any other industry in the face of all the poverty and that any wage below that is "sub-standard"; and all the other apparatus. The jury has found that its verdict does make "economic sense". And for good reason!

III. Evidence Pertaining to the Activities and Purposes of the Alleged Conspirators in Restraining Trade and Attempting to Monopolize Government Markets for Coal, Particularly the TVA Market, Including Solicitation of Government Officers and Agents Having to Do With the Purchase of Coal, Was Properly Admitted in This Case.

The size and the growth of the Government market for coal is reflected at page 1638a of the record. This market grew from 13,367,000 tons in 1954 to 27,511,500 tons in 1957. This tremendous growth resulted almost entirely from the rapid development of the TVA steam plant system in the period of this case. By 1957 the TVA purchase of coal represented approximately 5% of the total national consumption. The market upon which Phillips predominantly relied was the TVA market. The TVA Kingston steam plant, the largest in the world, was completed in the vicinity of Phillips' mine in late 1955 (1643a).

The activities of the alleged conspirators, including UMW, with respect to the Walsh-Healey minimum wage determinations, in 1955 and later in 1958, paralleled the activities of the conspirators in seeking to impose the same high minimum and uniform wage rate in labor contracts across the country, which created unsurmountable advantages to the business group with whom UMW was dealing, because of disparity in means of production and the other factors referred to in the statement of facts. As stated above, this phase of the conspiracy was practically identical with the type of conspiracy found to have violated the Sherman Act in **Carpenters and Joiners v. United States**, 330 U. S. 395. But the conspirators in **Carpenters** did not take the additional step of having a minimum wage determined by the Secretary of Labor in their locality in the wood industry. The record in this case reflects that there has been no deter-

mination of a minimum wage under the Walsh-Healey Act in the wood industry except for wood furniture (1621a) wherein a \$1.00 per hour minimum wage was determined industrywide. It appears that the Government market for wood did not play a significant part in Carpenters.

The growth of the Government market for coal, particularly the TVA market, and Phillips' reliance upon that market, have made the Government market for coal of major significance in the case at bar. Vital questions in the case were, what effect did the industrywide master conspiracy have upon that market and what particular steps did the alleged conspirators take with respect to that market? It would be sheer unrealism to go to the jury without answering these questions. And it would have been unfair to let the jury speculate about them.

The record reflects that UMW was having difficulty in imposing and enforcing the uniform contract wage rate in the area of the TVA market wherein small producers were supplying the developing steam plants. Phillips operated one of these mines. Implementing their efforts to impose the uniform rate industrywide by means of labor contracts, induced by muscle and force, the conspirators sought in 1955 to have the Secretary of Labor make a minimum wage determination under the Walsh-Healey Act in the coal industry. The conspirators worked together upon this project (458a). The desire of UMW that the "established operators" take the TVA coal business and the desire of those major coal combines to get the TVA coal contracts were plainly expressed (992a, 458a, 1636a). These "established operators" did subsequently obtain all the major term contracts (1658a). The purposes and intents of the proponents of the Walsh-Healey determination were expressed in the speech by the Secretary of Labor in which Mr. Lewis plainly con-

curred (465a-467a). This purpose was to exclude competitors of established operators from the Government market.

The Secretary of Labor determined a minimum wage in the coal industry in 1955 and, again, after the union contracts had repeatedly raised the wage, the Secretary of Labor made another determination in 1958, raising the minimum wage under Walsh-Healey by 50¢ per hour or \$4.00 per day to conform to the increase in the union scale since the 1955 determination. This second determination was, likewise, the result of joint activity by the conspirators (470a-472a). The minimum wage thus determined was twice as high as that determined in any other industry (1620a-1624a).

These activities effectively barred Phillips from the term market of TVA but Phillips continued to sell coal on the so-called TVA "spot contracts", for tonnage valued at less than \$10,000.00, exempted from the Walsh-Healey Act provisions. Because Phillips and other local miners were able to continue in operation under the spot coal contracts, UMW and the major producers turned their attention to trying to get the TVA purchasing officials to eliminate the spot coal business or substantially reduce the spot contracts. This effort was accompanied by the predatory pricing activities of major producers, including the union-owned companies, on the spot coal market, and it was from this latter phase that Phillips suffered its damage.

It is with this background that UMW would strip the case of any evidence pertaining to the activities of the conspirators with respect to the obtaining of minimum wage determinations under Walsh-Healey, relying upon **Eastern Railroad Presidents' Conference v. Noerr Motor Freight, Inc.**, 365 U. S. 127.

We believe that **Noerr** differs from the case at bar in several major respects: (1) In **Noerr** all of the activities complained of related to lobbying activities and there was no broader conspiracy which was being implemented by the lobbying activities; (2) **Noerr** did not involve the Government market for goods, and the officers or agents of the Government involved were not acting in the capacity of carrying out the purchasing policies of the Government when they were approached by the conspirators; (3) in **Noerr** the restraints complained of began, and ended, with the actions of officials representing governmental regulatory authority, whereas, in the case at bar the governmental action merely followed the establishment of an unfair prevailing wage by the conspirators, who then sought the Government agents to recognize the *fait accompli*.

We find no language in **Noerr** which would overrule the well established principle in anti-trust law that acts done to give effect to the conspiracy may be in themselves wholly innocent acts, yet if they are part of the sum of the acts which are relied upon to effectuate the conspiracy which the statute forbids, they come within its prohibition. **American Tobacco Company v. United States**, 328 U. S. 781. There is no indication in **Noerr** that the Court was overruling the principle that every conceivable act which could possibly come within the spirit of the prohibition of the anti-trust law, without regard to the garb in which such acts were clothed, are embraced in the Sherman Act. **United States v. American Tobacco Company**, 221 U. S. 106. In **Noerr** the Court certainly did not overrule the principle that a conspiracy is to be viewed by the Court as a whole; the integral parts thereof are not to be weeded out and inquired into separately. **United States v. Patten**, 226 U. S. 525.

In the **Noerr** case the only claim for damage was for damages resulting from the act of the Governor of Penn-

sylvania (pp. 130-131). In the **Noerr** case all of the evidence in the record, both oral and documentary, dealt with the Railroad's efforts to influence the passage and enforcement of laws (p. 142). In **Noerr** the Railroads, though desiring to restrain competition, never agreed to take, and never took, a single step which would take them out from under the constitutional right to engage in politics and they did not create a Sherman Act conspiracy. There was no anti-trust conspiracy for the Court to consider, but only a political campaign.

In **Continental Ore Company v. Union Carbide Corp.**, 370 U. S. 690, the complaint under the Sherman Act relied on several various phases of restraints practiced by the defendants. One of these phases pertained to the actions of one of the defendants as duly designated exclusive purchasing agent for the Metals Controller of Canada. The **Noerr** case was relied upon under this phase by the courts below in dismissing the complaint. The courts below had dealt separately with each phase of the restraints alleged in the complaint and dismissed all of them after this separate consideration. But this Court said (p. 699):

“In cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each . . . ‘the character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole. **United States v. Patten**, 26 U. S. 525, 544, . . . ; and in a case like the one before us, the duty of the jury was to look at the whole picture and not merely at the individual figures in it.’ **American Tobacco Company v. United States**, 147 F. 2d 93, 106 (C. A. 6th Cir.); See **Montague & Company v. Lowry**, 193 U. S. 38, 45, 46.”

This Court further said in **Continental Ore**, pages 706-707:

"Respondents are afforded no defense from the fact that Electro Met of Canada, in carrying out the bare act of purchasing vanadium from Respondents rather than Continental, was acting in a manner permitted by Canadian law. There is nothing to indicate that such law in anyway compelled discriminatory purchasing, and it is well settled that acts which are in themselves legal lost that character when they become constituent elements of an unlawful scheme. *Swift & Company v. United States*, 196 U. S. 375, 396; *American Tobacco Company v. United States*, 328 U. S. 781, 809; *Steele v. Bulova Watch Company*, 344 U. S. 280, 287; See *Georgia v. Pennsylvania Railroad Company*, 324 U. S. 439, 457, 458; *Slick Airways, Inc. v. American Airlines, Inc.*, 107 F. Supp. 199, 207."

The reference made in this very recent decision of the Court to *Slick Airways, Inc. v. American Airline, Inc.*, 107 F. Supp. 199, 207 (petition for prohibition dismissed 204 F. 2d 230; cert. den. 346 U. S. 806), apparently has to do with the following language from that case:

"The defendants misconceive the nature of the complaint by confusing the means allegedly used with the result to be achieved. They view the complaint as alleging combinations or conspiracies to waste the resources of the plaintiff through predatory rate policies, to abuse the privilege of intervention in CAB proceedings, and to conduct a campaign of unfair competitive practices which amount to contracts and agreements within the purview of Sec. 492. It is in this that they fall into error for these alleged acts rather constituted the means and methods by which the defendants conspired to drive the plaintiff out of business in violation of the anti-trust laws. As the Supreme Court said in *American To-*

bacco Co. v. United States, 328 U. S. 781, 809, 66 S. Ct. 1125, 1139, 90 L. Ed. 1575: 'It is not the form of the combination or the particular means used but the result to be achieved that the statute condemns' " (107 F. Supp. 207).

In *Slick Airways* at pages 213-214, the Court said:

"Plaintiff contends that as part of the plan to drive it out of the air freight industry defendants abused their privilege to intervene in CAB proceedings by their efforts to block and delay the issuance of a Certificate of Convenience and Necessity to the plaintiff to act as a common carrier, the issuance of which certificate it alleges was 'an absolute prerequisite to plaintiff's achieving its objectives in the freight business.' Defendants' alleged efforts to block certification included 'a well-planned campaign of opposition before the Board' which resulted in '65 days of hearing, 35,000 pages of testimony and briefs before the examiners, a year's study by the examiners, * * * and finally, three and a half years after the application was filed, a decision which the defendants have now appealed to the United States Court of Appeals of the District of Columbia Circuit', as well as the dissemination of false and misleading propaganda and other similar tactics in the public relations field. None of these matters alleged would seem to require any initial determination by the Board even though the Board may have exclusive control over its own procedures for the nature of the question is not that plaintiff attacks the administrative processes in the procedural field, but that defendants have used the processes of the CAB as instrumentalities with which to effect the conspiracy. While it may be questioned whether any of this 'alleged activity by defendants of itself constituted

illegal conduct, it is fundamental, as previously noted, that legal means may be utilized to accomplish the unlawful objective of conspiracy, American Tobacco Co. v. U. S., *supra*, 328 U. S. at page 809, 66 S. Ct. 1125, 90 L. Ed. 1575, and this court cannot deprive the plaintiff of its right to attempt to prove that these alleged acts were part of the total acts undertaken to effectuate the alleged conspiracy" (Emphasis added).

In **Union Carbide and Carbon Corp. v. Nisley**, 300 F. 2d 561, certiorari denied (on Wade's petition) 371 U. S. 801, the Court of Appeals for the 10th Circuit sustained the jury charge given by the District Court as follows:

"The Court, correctly we think, instructed the jury that if defendants used the agency powers 'for the purpose of carrying out or assisting any combination or conspiracy to restrain trade or to monopolize trade in the vanadium industry or any actual monopolization thereof, the fact that they might have been Government agents at the time does not immunize their conduct,' and that 'a violation of the anti-trust laws may be carried out by acts which, standing alone, may be legal, but if they form a part of an illegal combination or conspiracy to restrain or monopolize, then you may consider them with all of the other evidence in the case to arrive at your verdict.' The Court then proceeded to particularize to the effect that if, in the execution of a Government ore mining program USV arrived at prices paid the miners as a result of an agreement with VCA to pursue a plan to monopolize the vanadium industry, the fact that it was acting as agent for MRC (Metals Reserve Corporation, a United States Government Agency) would not immunize other unlawful conduct." 'And this is so' said the Court, 'though

Government officials knew and tacitly approved the ore purchasing programs which violated the anti-trust laws" (Emphasis added).

Continental and Union Carbide are more in point on the issue here than is **Noerr** since the latter had nothing to do with a campaign broader than a political campaign, or with activities and purposes of conspirators with respect to a government market for goods.

There needs to be considered the purposes of the Walsh-Healey Act and the role of Government officers thereunder. As stated in **Perkins v. Lukens Steel Company**, 310 U. S. 113, 128:

"The Act does not represent an exercise by Congress of regulatory power over private business or employment. In this legislation Congress did no more than instruct its agents who were selected and granted final authority to fix the terms and conditions under which the Government will permit goods to be sold to it. The Secretary of Labor is under a duty to observe those instructions just as a purchasing agent of a private corporation must observe those of his principal."

We believe that the Walsh-Healey Act must be read alongside of the anti-trust laws and the purposes covered by those laws, rather than being considered in derogation of the anti-trust laws. The Government does have a tremendous demand for goods and the Government market in this day and time represents a gigantic part of the overall markets for goods in this country. We believe that the anti-trust laws were intended to, and do, cover with its prohibitions and protections the transactions involving the officials who control the buying of goods for this great market. The particular Government market involved in this case, the TVA market for goods, does

come under the protections and prohibitions of the anti-trust law. **United States v. General Electric Company** (DCPa, 1962), 209 F. Supp. 197. As we understand that case, it involved the garnering of TVA business at high rigged prices by means of conspiratorial practices which frustrated the terms of the Public Contracts Act, of which Walsh-Healey is a part. The basis of the action was not simply that the Public Contracts Act was violated but that contracts at rigged prices were procured from government purchasing officials pursuant to a Sherman Act conspiracy.

Surely the **General Electric Company** case and the related case of **Application of State of California**, 195 F. Supp. 37, show there is a great danger if the insulations and protections afforded by the Sherman Act are removed in whole or in any part with respect to activities directed at government officials, local, state or federal, who have responsibility in awarding or fixing the terms of contracts for the purchase of goods on the public market.

IV. The Evidence Was Sufficient to Support the Verdict Below; These Proceedings and Judgment Have Been Accompanied by the Utmost Deliberation.

This is not a case that has been hastily tried and rushed up to this Court for primary thorough consideration by brusque action of Counsel and the lower Courts. There has been a careful application of principles long established by this Court at each stage of the case.

It commenced in 1958. After extensive research, revisions of pleadings, careful preparation of a thorough pre-trial order, and extensive preparation for trial involving depositions in many states, the case went to trial before a jury in April, 1961. There was a three week trial and the jury deliberated three days before bringing

back its verdict for Phillips after receiving carefully prepared instructions of the Trial Judge as to which UMW has found scant reason to complain. A reading of the Trial Court's jury charge confirms the fairness with which the rights and contentions of UMW were protected.

The deliberate care and consideration extended by the Trial Judge in taking up and deciding the lengthy post-trial motions is shown at page 90a. Judgment was entered against UMW August 2, 1961.

Lengthy briefs were filed in the Court of Appeals (including amicus curiae briefs) and that Court heard oral arguments in October, 1962. More than a year's deliberation preceded the decision of the Court of Appeals, which was filed December 18, 1963, sustaining the judgment below.

UMW and amicus curiae supporting UMW (all of whom have sizeable and distinguished legal staffs) had four months since the granting of the Writ of Certiorari by this Court in which to prepare briefs and they used every bit of that time. We are trying to file this reply brief within our thirty days, because, frankly, we dread the effect of further delay.

A. There Was Material Evidence from Which the Jury Could Find That the Conspiracy Existed as Alleged; the Norris-LaGuardia "Clear Proof" Rule Was Charged and Has Been Satisfied.

We believe that the Court of Appeals (1753a) has stated in language well supported by the cases the basic proposition:

"The union contends that not only—was there no direct evidence that it conspired with the large coal companies, or with anyone, for the purpose of putting any operator out of business, but that there is the

unchallenged testimony of its president and its secretary-treasurer that it at no time joined with or agreed with any co-operator for such purpose. But it is recognized that conspiracies are seldom capable of proof by direct testimony and it is settled that they may be inferred from the acts of the parties thereto. Circumstantial evidence of the existence of a conspiracy may be sufficiently strong to raise a factual question for the jury even though there is no direct evidence that a conspiracy existed. It is the function of the jury to observe the witnesses while testifying, to appraise their credibility, to draw inferences from the facts established, to resolve conflicts in the evidence and to reach ultimate conclusions of fact. *Eastern State Retail Lumber Dealers Association v. United States*, 234 U. S. 600, 612; *Local 175, etc. v. United States*, *supra*, 219 Fed. 2d 431, 433, C. A. 6th, cert. denied, 349 U. S. 917; *Loew's Inc., v. Cinema Amusements*, 210 Fed. 2d 86, 93, C. A. 10th, cert. denied, 347 U. S. 976."

How the foregoing rule has been applied in cases involving unions under the Sherman Act can best be determined by looking at some of the cases discussed above which this Court has considered.

In *Carpenters* it is not apparent that there was any direct evidence of the conspiratorial agreement. It appears that the conspiracy arose when the union came to the employer group and demanded an increase in wages (144 Fed. 2d 548). This is similar to the situation that arose in the coal industry in 1950. However, in *Carpenters* there was no evidence that the conspirators were, at the critical time of the formation of the conspiracy, struggling over the basic issue of over-production and the need for stabilization of production. We have ample proof in this case that this was a basic overriding question at the critical time.

In **Carpenters**, the theory of the Government was expressed as follows (144 Fed. 2d 549):

"They (the indictments) must be viewed in the light of all the facts charged, and, though such a provision in a contract (the protective wage clause) may not be invalid on its face, the factual context in which it will work, its alleged purpose and ultimate effect cannot be ignored in determining its actual validity. Considering all these factors the Government contends that the agreement was for the express purpose of committing the offense of violating the Sherman Act; that the gains in wages to the labor conspirators and in the profits to the co-conspiring manufacturers from their monopoly grip on the home builder and other consumers of such lumber products in the San Francisco area were not mere fortuitous and incidental results of the agreement. . . ."

These contracts from which the conspiracy was inferred in **Carpenters** were enforced "through conference or picketing or acquiescence in the arrangement" (330 U. S. 399).

The disparity in the means and methods of production between the two competing groups was a matter of utmost importance in **Carpenters** and the Court of Appeals held (144 Fed. 2d 552):

"But in reviewing the record we find evidence of agreements between the two groups and conduct on the part of each directed at the elimination of competition from the northern products by the price control and other acts from which a jury well could find a concert of action and purpose to unlawfully restrain interstate commerce. Therefore, the Trial Court did not err in submitting the case to the jury."

We have discussed above that in **Allen Bradley** the whole conspiracy arose from the drive of the union to

expand its closed shop agreements throughout the area. These closed shop agreements benefited the local union members but they barred from the market the goods of outside producers. The dissenting Justices had trouble inferring from these activities a purpose to aid the employer group. Mr. Justice Roberts stated (325 U. S. 818):

“Albeit the findings are that manufacturers and repairers of electrical appliances violently resisted the unionization of the businesses, they, one by one, surrendered and signed. In doing so many must have had knowledge of what others were doing or had done. And, as the coverage became complete, each one was enabled to stifle out-of-town competition and to raise prices. In any action against them and the union charging conspiracy it would be urged that a conspiracy need not consist of a written or verbal agreement but might be inferred from similarity of action. And it would be little protection to the employers concerned that, in each instance, a separate agreement was signed between union and employer.”

In **Allen Bradley** Mr. Justice Murphy said in his dissenting opinion (325 U. S. 820):

“The union here had not in any true sense ‘aided’ or ‘abetted’ a primary violation of the act by the employers. In the words of the union, it has been ‘the dynamic force which has driven the employer-group to enter into agreements’ whereby trade has been affected. The fact that the Union has expressed its self interest with the aid of others rather than solely by its own activities should not be decisive of statutory liability. What is legal if done alone should not become illegal if done with the assistance of others and with the same purpose in mind. Otherwise a premium of unlawfulness is placed on collective bargaining.”

The majority of the Court in **Allen Bradley** held contrary to the above expressed views of the dissenters and it would seem that the fundamental difference is that the majority of the Court inferred a purpose to aid the employer group while the dissenters could not reach that inference from the foregoing facts. It appears fundamental that it is for the jury to draw reasonable inferences and make the conclusions with respect to the fact and **Allen Bradley** stands for the proposition that, where the union has gone to extremes in restraining trade and giving unfair advantage to one group of competitors with its agreements, somewhere along the line the jury may reasonably draw the inference that one of the purposes of the union was to aid the employer group that ended up with the business.

It is to be observed that in **Allen Bradley**, the same as in **Carpenters**, there is no expression in the opinions which would indicate that the union was talking to the employer group at critical times about the need for stabilizing the market or the problem of over production or the need to restrict production. So the inferences of anti-trust law violation that the jury could draw in the case at bar are far stronger than those that were permitted to be drawn in either **Allen Bradley** or **Carpenters**.

Another aspect of the case at bar which makes it a stronger case than either **Allen Bradley** or **Carpenters** is the fact that UMW, by reason of its investment, was sitting on both the business side and the union side of this combination. UMW ultimately expected to make immense profits from its investments in major coal companies (493a). The effort to conceal the direct ownership of UMW in these companies failed, and it was finally conceded that UMW was to share in the profits of those companies (1125a). Our statement of facts in Appendix I shows that the reasons UMW gave for making these investments were completely refuted. These were the com-

panies that were most active in causing Phillips to suffer damage. Accordingly, in this case the jury was confronted with facts which would raise strong inferences of a purpose to impose restraints on competition in the markets. Investments by a union or by union members in business groups with which the union deals are facts which the jury may consider in a Sherman Act case. **Los Angeles Meat and Provision Drivers Union, Local 626 v. United States**, 371 U. S. 94, 106-107; **Streiffer v. Seafarers Sea Chest Corporation**, 162 F. Supp. 602, 607. A point that has received scant attention in this case heretofore is the fact that the Clayton Act exemption of labor organizations applies only to organizations "not conducted for profit" (15 U. S. C. A., Sec. 17). We have been reluctant to complicate this case by reliance upon that provision. However, profit making motives would seem most important in determining a union's purpose in this kind of case, regardless of the technical meaning of this clause in the Clayton Act exemption.

The opposing briefs rely heavily upon denials of conspiracy by the alleged co-conspirators to nullify all reasonable inferences to be drawn from the proof. Denials of conspiracy should be particularly suspect when they are overreaching and are contrary to well proven facts in the record. In this case Mr. Lewis was asked by UMW Counsel whether he had ever been a party to any agreement with reference to the pricing of coal. Mr. Lewis responded: "I have not, neither in an individual capacity nor in an official capacity as representative of the union, nor other labor organizations when I was representing other labor organizations" (1139a-1140a). It is this denial that UMW has given special attention and prominence.

But, on the record, this denial was not correct. UMW sponsored, and was responsible for, the stabilization

agreement in the anthracite industry which was an agreement between UMW and major anthracite operators. This was according to Mr. Lewis' own statement (312a-313a). This was the very kind of stabilization agreement which Mr. Lewis was urging upon the bituminous operators in 1949-50 to rebut "the tendency of the industry to reduce their prices in the face of increasing competition" (315a). The jury was exercising its prerogatives in rejecting denials which could not be reconciled to facts.

We believe that an analysis of the decisions which have sustained findings of conspiracy to restrain trade or to monopolize, or to attempt to monopolize, would produce few cases where there is more persuasive proof than in this case that the parties charged actually negotiated and bargained over the means of stabilizing an industry, reached an understanding, effected a sharp change in the course of the industry with benefits to the negotiators and distress to the non-participants.

UMW contends that this course has been dictated by the National Bituminous Coal Wage Agreement reached in 1950, under the supervision of Federal Courts, the NLRB and a presidential fact-finding board. These agencies cannot be held responsible. They were concerned solely with the employer-employee relationships between an organized group of employers and a bargaining representative of their employees. It is not reasonable to say that these public agencies were apprised of all understandings reached by the negotiating parties in 1950, or of how those understandings would be implemented in the succeeding years. These agencies were concerned with the making and the validity of the written agreement executed in 1950. They were not authorized or empowered to determine if there were any other understandings or agreements or purposes violating the Sherman Anti-trust Act not expressed in that collective bargaining agreement.

In asserting that there was insufficient evidence in this case to support the verdict, the opposing briefs rely upon the Norris-LaGuardia "clear proof" rule. We submit that that rule has been satisfied in this case. The Trial Court gave an instruction on this rule in its charge to the jury (1555a). No objection or further request was made. In its motion for a new trial UMW assigned as error the giving of this charge (72a). We have never understood why UMW assigned this as error, since this part of the charge was for UMW's benefit. If the intent were to show that the charge was in improper language, no effort was made to straighten the Court out on this language and it seems apparent that the language was correct under Section 6 of Norris-LaGuardia (29 U. S. C. A. 106).

Practically all of the proof in the record with respect to the activities of UMW relate to the acts of the International officers of the union, proved by their own statements and testimony. We believe it is impossible to find any major part of the evidence pertaining to UMW which had not been clearly proved to have been participated in or authorized by these International officers. Actually, many of the statements of the International officers have been included in reports to the International Convention of the Union and have been expressly approved by those conventions, when the International officers' reports were submitted. The case is entirely unlike Carpenters in this respect. In the latter case the acts were being done by local officers and agents and the International Union had only a distant relationship to the things being done in the San Francisco Bay area.

B. There Was Material Evidence to Support the Amount of Damages Found by the Jury and Sustained by the Two Lower Courts.

A large part of the record in this case had to do with the amount of damages. From this proof the jury has

made its finding and this is within the historic province and function of the jury. *Lavender v. Kurn*, 327 U. S. 645, 652-653.

The facts upon the damage issue are set forth herein-after in the statement of facts contained in Appendix I, particularly in Part II thereof, and to conserve space we simply make reference to those facts here. The Court of Appeals considered some of these facts in its opinion (1761a-1763a). It is submitted that the Trial Court and the Court of Appeals were both correct in sustaining the jury verdict.

CONCLUSION.

For the foregoing reasons Phillips submits that the judgment below should be sustained.

Respectfully submitted,

JOHN A. ROWNTREE,
1412 Hamilton National Bank Building,
Knoxville, Tennessee,
Attorney for Respondents.



APPENDIX I.

COUNTER-STATEMENT OF FACTS.

I. There Was Abundant Proof to Support the Jury's Finding That There Was a Conspiracy as Charged by Phillips.

It is the contention of Phillips that the conspiracy charged was formed in 1950. At the end of 1949 Mr. John L. Lewis gave a summary of the controls that existed at that time over the nation's coal production. He reaffirmed these statements in his testimony in this case (319a). Mr. Lewis made it his business to know such facts as these (401a, 403a).

According to Mr. Lewis, the so-called captive mines owned by steel companies produced 52,000,000 tons per year and the steel companies also bought an enormous tonnage of coal from commercial producers. Pittsburgh Consolidation Coal Company (presently Consolidation Coal Company), the largest commercial coal producer, with other companies closely allied to it, produced approximately 100,000,000 tons per year (320a).

In the South, according to Mr. Lewis, there was the Island Creek Coal Company and Pocahontas Fuel Company and certain others operating through Southern Coal Producers Association. This Association was a "front for Appalachian Coal, Inc.," which levied a brokerage rate as a sales organization on about 45,000,000 tons per year. Island Creek Coal Company controlled Appalachian Coal, Inc., and Island Creek had vast influence with any company that sold coal through Appalachian Coal, Inc., and "it would be commercially and to some degree financially disastrous for those companies, members of Southern Coal

Producers Association, to take any other attitude than the attitude taken with respect to wage contracts by the Island Creek Coal, which dominates Appalachian Coal, Inc." The controls of Island Creek Coal Company covered approximately 100,000,000 tons of production per year (320a-321a). There were controls emanating from the trust that owned Island Creek Coal Company, which trust was associated with major financial interests in the steel industry (321a).

Mr. George Love of Pittsburgh Consolidation Coal Company, and Chairman of the Operators' Negotiation Committee of 1949-50, represented these great combined interests and was, according to Mr. Lewis, "in the position of being the actual, as well as the titular, leader and spokesman of the coal operators of the country due to circumstances and competitive relationships in the industry" (323a).

"No commercial coal operator, as yet, in the country . . . producing commercial coal would hazard his business future by undertaking to disagree with the leadership furnished the industry . . . through Mr. George Love and Mr. Harry Moses, who is on the outside but is advisor and counsellor of Mr. Love" (323a).

A commercial producer, "if he wishes to sell his coal in the open market and sell some of it to these industries . . . cannot offend them by undertaking to go contrary to their wishes on wage negotiation policies" (323a).

It is the contention of Phillips that this powerful business group in the coal industry as above described by Mr. Lewis, collided with United Mine Workers in 1949-50, over the means of resolving the basic and chronic problem of the industry—periodic over-production and need for stabilization, and that they came out of their conflict in 1950 with a solution that has worked.

A. In the Struggle Between UMW and the Major Coal Companies in 1949-50, the Question of the Means of Stabilizing Coal Prices and Production Was an Important Issue.

The coal industry has been plagued with feast and famine and with peaks and valleys in demand (317a, 1431a). The industry need for stabilization to level out the supply and demand (1449a) cannot, we believe, be solved legitimately by a few in the industry to squeeze out the many by plan or concerted effort. The record in this case discloses that such a plan and concerted effort commenced in 1950, and that the most vital factor involved was a sudden switch in UMW's policy. The record establishes that in 1950 UMW ceased to be primarily a representative of the coal miners throughout the country but became, rather, an economic umpire favoring, by pre-arrangement, the large coal combines, working with huge machines in thick seams of coal, over the small mines using manpower with small machines and tools in the thin seams.

Mr. George Love of Consolidation Coal Company stated that the picture in early 1950 was beset with more competitive uncertainties than the industry had ever seen (542a). The Union's witness Scollon shows in Exhibit 149A (1717a) that the big mines were rapidly going down hill in the share of the production of the industry from 1945-1949 but in 1950, after the combination was formed they began increasing their position in the industry (1314a).

The Union's position before 1950, and particularly in 1948, upon the need for stabilization, was clearly stated by Mr. John L. Lewis at the UMW convention held in 1948:

“The productive capacity of our coal industry exceeds at any normal time the consuming capacity of

our markets. For many long years the coal industry was developed to a degree that the work-time of the industry was intermittent, and in the majority of the coal-producing states was almost chronically under two hundred days per year work time opportunities. . . .

"The mine workers had a bitter experience in that matter and we have taken some profit from it. In the anthracite industry we made it an issue, and due solely to pressure from our organization and the policies which we suggested we were finally able in the anthracite region, covering Districts 1, 7 and 9, to put into effect a joint commission consisting of representatives of the operators, representatives of the three Districts of the United Mine Workers, and representatives of the State of Pennsylvania, to allocate the work time for the anthracite industry, so that such work time as was available would be shared by all of our members in as substantially equitable a manner as could be made effective. This arrangement has proven to be a great stabilizing influence in the anthracite industry. . . .

"I merely want to say this in connection with this matter. When this market condition comes to a point in the bituminous industry that it threatens the stability of our contract and the working conditions of our people, when the disparity of employment gets to a point where it constitutes a rank injustice and lack of opportunity for our members to work, the United Mine Workers of America, itself, may find it necessary to advise our members how many days a week they need to work. We have that contractual right, because the contracts are written to permit that. It is a matter of self-preservation for our Mine Workers; it is a matter of self-preservation for the investors in the industry. If the operators of this country can't give any leadership on the commercial

side of this industry, the United Mine Workers of America can and will.

“So next year, in 1949, or at any other time, when evil days come upon this industry, you will find the United Mine Workers of America moving in, and if there are only three days' work in this industry we will all have the three days' work. These things are of the utmost importance. . . .” (312a-314a).

In 1949-50 the Union applied its indicated approach to stabilization and over-production. Mr. Lewis made the following statement at the first session of the bargaining conferences of 1949-50:

“There comes up at this conference, we think, the question of some regulation of the working time, some stabilization in the industry. The Mine Workers have gazed at some degree with admitted apprehension at the tendency of the industry to reduce their prices in the face of increasing competition. Frankly, we think the industry has been too hasty. . . .

“There has been much talk lately about a stabilization plan. . . . [W]e do have a segment of the coal industry operating under a plan that brings about a distribution of working opportunity (Mr. Lewis then explained a plan that had been worked out in the anthracite industry). We would like to talk to you in this conference on some improvements and stabilization which is a question of magnitude in the minds of the men as affecting the investment in the industry. We would rather deal with you when you are opulent rather than when you are poor. We like to negotiate with you when you are full, when you are satisfied, when you can pay your board at first class establishments, and we can too. . . .” (314a-315a).

Mr. Love testified that there was considerable discussion in these sessions on limited work week (538a-539a).

As the bargaining conferences of 1949-50 wore on, the Union commenced to apply the three-day work weeks which were forecast by Mr. Lewis in his 1948 speech. The three-day work weeks were applied repeatedly by the Union (314a, 539a).

The statements of Mr. Lewis in his deposition upon this subject are important because he later completely changed his testimony in this regard when, it would seem, he realized the effect under the issues here of proof that industry stabilization was a principal issue in the 1949-50 negotiations.

In his deposition we reminded Mr. Lewis of the statement he had made in 1948, which is quoted above, and in answer he stated:

“Oh yes, and I may say that those observations merely relate to one thing: The equitable distribution of work opportunity in the coal industry and the desire of the United Mine Workers to have the work opportunity more equitably distributed. It had nothing to do with any other subject.”

Then Mr. Lewis was asked:

“Q. And in 1949 and 1950, during the period that the negotiations for the 1950 contract were going on, you did set three-day work weeks and other types of work weeks in the industry?

“A. We set a three-day work week, yes, to distribute the work and the opportunity for work; and for no other reason” (314a).

Mr. Lewis repeated again that the 1949-50 three-day work weeks were solely to get away from the feast and famine in the industry (317a). Again, he stated that the “sole consideration was equality of opportunity” in setting the three-day work weeks in 1949-50 (316a).

In spite of the foregoing testimony in the deposition, which was read at the trial, and in spite of the actual

history of the United Mine Workers sponsoring a spread-the-work plan in the anthracite industry to give more equal opportunities for work, when Mr. Lewis later was on the witness stand at the trial, he testified that the limited work week was not proposed as any permanent thing—that the United Mine Workers would refuse a limited work week—that it was absurd from an economic standpoint (1104a-1105a). He further testified that the three-day work week during 1949-50 negotiations was: "A small piece of strategy designed at the moment to create a little discomforture in the operators' rank while they were disinclined to make an agreement and abate the controversy" (1105a).

This testimony is to be compared with the testimony he gave earlier in his deposition. The jury was entitled to make this comparison.

The jury was entitled to reach the conclusions on the record that the question of over-production and the need for stabilization in the industry, as previously expressed in the Union's Convention Minutes and in the testimony of Mr. Lewis, was an urgent motivating factor in the negotiations conducted by the Union in 1949-50.

Incidentally, counsel for UMW and the Welfare Fund Trustees, inserted in the evidence in this case at page 1026a, Exhibit 128 which contained a history of the UMW Welfare Fund from 1945 to April 26, 1951. This history was included in this case in an appendix in the Court of Appeals and is part of the certified record filed in this Court in the companion case No. 39, October Term, 1964. This history included the following:

"June 8, 1949

"President Lewis authorized all members of the U. M. W. A. to stop work on June 13th. The stoppage was termed as a brief stabilizing period of inaction

during which cessation of all mining will occur.' The reason for this move, President Lewis wrote, was that 'magnificent production efforts' of miners so far this year has resulted in overproduction with consequent economic instability among the miners. 'This period of inaction will emphasize a lack of general stability in the industry and the dangers which will accrue therefrom if current harmful practices are not remedied. It will contribute constructively to the abatement of current economic demoralization; it will not adversely affect the public interest; it will help preserve property values in the industry; and it will help preserve the living standards of the mineworkers, their dependents, and the communities which depend upon mineworkers' income.'

"June 13, 1949

"385,000 members of the U. M. W. A. left the pits for one week stabilizing period. Talks with the U. S. Steel Corporation at Philadelphia began. After two sessions the bargaining groups adjourned until

June 23rd.

"The New York Times disclosed plans for appointing a coal 'Czar' who would control and allocate some 200 million tons of soft coal annually among its members.

"June 14, 1949

"President Lewis asked Northern and Western Soft Coal operators who mine more than half the country's coal to meet with him. Mr. Love, President of the Pittsburgh Consolidation Coal Company, said that a 'Czar' for the bituminous operators' group would end 'chaos in the industry.' The purpose of the new group 'is not to establish a "Czar" or limit production or create an industrial monopoly to match the labor

monopoly; the purpose is simply to bring order and dignity into labor relations of the industry and to avoid chaos which has too often attended labor negotiations and inconvenienced the public.'

"June 16, 1949

"The Senate Banking Committee voted an inquiry sponsored by Senator Robertson of Virginia to find out whether the plans being sponsored by the operators' group for a coordination of labor relations would violate anti-trust laws.

"The U. M. W. A. Journal declared 'divide the orders, share the work' program is now a 'must' in the soft coal industry. 'Since the coal industry of its own accord, cannot get together and exhibit the business acumen necessary to protect its employees and the business and population of the mining communities, the duty of performing this public service devolves upon the only stabilizing force the industry has ever known—the U. M. W. A.'

• • •
"July 25, 1949

"Hearings began before Senate Banking and Currency Committee. Mine operators claimed union rights do not include right to restrict production, Mr. Moses charged the union with 'an arbitrary abuse of this economic power.' Senators who arranged hearing said they were thinking of repealing labor unions' exemptions from the anti-trust laws. Senator Robertson said the three-day week in the soft coal mines is more than an effort on the part of the miners to better their working conditions, 'it is a bold, overt act to control production and prices, the assertion of a power or right in the labor unions to stabilize the industry upon its terms through production control.'

"August 1, 1949

"Miss Josephine Roche, Director of the U. M. W. A. Welfare and Retirement Fund, and Dr. Warren Draper testified before Senate Banking and Currency Committee on 'effect of economic power of unions upon banking and credit policies, small business enterprises, consumer prices, and national economic stabilization.'

As to the position of the operators in 1949, Mr. George Love, spokesman for the major coal companies in the negotiations with the Union in 1949-50, when asked about the growth of the non-union coal companies, said that it was about 25% of production in the Northern Districts, and added that there was a big volume of non-union coal in the Midwest. He said the Progressive Miners and non-union miners in western Kentucky mined about 2,000,000 tons of coal per year. It was reasonable for the jury to conclude that the in-roads being made by this non-union production and the decline of the big mines in the industry (1717a) was a significant matter in the minds of the 1949-50 negotiators.

The representatives of the major coal companies, particularly Mr. Moody, head of the Southern Coal Operators' Association, complained bitterly about the Union's effort to impose economic dictatorship, with its stabilization plan, and took the position that if the operators engaged in such a plan they would be in clear violation of the anti-trust laws. Mr. Lewis testified that he knew operators were taking that position but that he considered it "of little moment" (387a).

Mr. Lewis testified that the operators protested against the limited work week (316a, 386a). He testified that the representatives of the major coal companies were not interested in a limited work week (316a). Mr. Lewis

testified that the real reason the major coal companies objected was because it hurt them in their pocketbooks—"their left hip pocket" (387a-388a).

Mr. George Love, principal spokesman for the major coal companies in 1949-50 (534a), testified that the United Mine Workers exercised a strong economic force in the industry (534a); that the 1949-50 conferences dealt with the Union's limited work week plan of stabilization (538a-539a); that there was more coal than the market could absorb (538a) and that the operators resisted the UMW's three-day limited work week plan as a solution to the over-production problem (538a-539a).

The seriousness of the struggle that went on in 1949-50 in the bituminous coal industry is indicated by the intervention of the governors of various states and finally by the President of the United States and by the suffering that the country experienced through the shortage of coal (271a-276a).

The raft of cases brought by the operators concerning contract terminology (275a) deal with subjects that would hardly explain the critical condition brought about in the country. The Board of Inquiry appointed by the President got the impression that the disputes over contract terminology were merely tactical maneuverings overlying the basic economic questions (1492a-1493a). If the basic struggle was economic, and, in light of the later readiness of the large companies to grant increases in UMW contracts after 1950, it is reasonable to conclude that only a contest over the future of the industry and the solving of the problem of over-production could explain the critical condition that the country as a whole was thrown into by this struggle. There was substantial evidence in the record that a second major matter of dispute was the control of the UMW Welfare and Retirement Fund, as to which see Appendix II.

B. An Understanding on the Future of the Industry Was Reached in 1950 and This Resulted in a Great Change in the Relations Between the Major Companies and the Union and Between the Major Companies and the Smaller and Weaker Companies.

Upon the signing of the National Bituminous Coal Wage Agreement of 1950 on March 5, 1950, Mr. George Love stated:

"This two and one-half year contract gives the industry its first real opportunity for stability in the last decade. Both the union and the operators made concessions. The Operators definitely established the right to control their production and their mining facilities. The union asked for a cooperative administration of the welfare fund, and we are giving it to them. We will help every way possible to make this huge fund a definite credit and benefit to the industry, however, the responsibility is squarely on the shoulders of the union, and if it fails, the public and ourselves will look directly at the union" (547a).

This language gives a clue as to how the two major issues, overproduction and control of the Welfare Fund, were settled. As to the course the Welfare Fund was to take, see Appendix II hereinafter.

Mr. George Love, spokesman for the operators, testified that the Union gave the operators the right to run their own mines and that this was an important economic consideration (545a-546a).

It was thus clear that any stability that was to be attained in the industry was not to be attained by pursuing the Union's plan of spreading the work or limiting the work week. After 1950 the Union said nothing more about a limited work week or a stabilizing plan in the bituminous industry. No more need be said if a plan had been reached.

There is a sharp contrast in the bargaining before 1950 and after 1950. The history of bargaining before 1950 is set forth in 262a-276a. It is characterized by one struggle after another between the major companies and the Union involving many strikes, seizures by the Government, all kinds of lawsuits, and a complete inability to see eye-to-eye on anything.

In 1950, after the signing of the UMW contract, the Bituminous Coal Operators' Association, which has asked to file a brief here as *amicus curiae*, was formed by the major companies (394a). Mr. Moses was appointed as a one-man negotiator for the operators who were members of the aforesaid association, and in 1951, long before the two and one-half year period of the 1950 contract had expired, Mr. Lewis and Mr. Moses sat down alone and negotiated increased wages in the form of the 1951 Amendment to the 1950 contract (395a). The same procedure was repeated in 1952 (395a-396a). After Mr. Moses died Mr. Fox took his place. Mr. Fox and Mr. Lewis followed the same procedure in negotiating successive contracts in private long before the expiration date of the preceding contract (396a-399a). UMW has referred to this procedure as simply being a compliance with the 60-day "cooling-off" period required by the Taft-Hartley Act, although the facts are undisputed that these successive contracts were negotiated and executed many months before the expiration of the preceding contracts. BCOA, in its brief *amicus curiae* in the Court of Appeals refers to this procedure as "arm's-length collective bargaining" and characterizes this as a procedure to be desired. However, BCOA, like the UMW, offers no explanation for the fact that, prior to 1950, the operators and the UMW engaged in constant economic struggles which virtually kept the nation short on coal for 8 critical years, from 1941 through 1949, and suddenly after 1950 the operators were willing to yield to all of UMW's demands in 1951, 1952, 1955, 1956, and 1958 with-

out even awaiting the expiration of the preceding contract. In this regard, BCOA makes the following statement in an earlier brief:

"The record will show, however, that the negotiations since 1950 have not been without real issues between the parties. Each new union demand has been carefully analyzed for its legality and its economic impact on the members of BCOA. Many demands have been opposed and few have been accepted without compromises."

There is nothing in the record to substantiate this allegation. The record in this case discloses that, since Mr. Moses' death, Mr. Lewis and Mr. Fox are the only two persons who can verify such an assertion. Mr. Lewis, the only one of the two survivors who testified in this case, apparently did not choose to divulge the events which took place between him and Mr. Fox and Mr. Moses.

The UMW took the position at the trial, and, along with BCOA, takes the position on this appeal, that it had the legal right to negotiate contracts according to any procedure which it desired and that it negotiated the 1950 contract under court and NLRB compulsion. It then comes to the conclusion that, when the injunctions against UMW were dismissed after the 1950 agreement, the court and the NLRB necessarily put their stamps of approval upon the legality under anti-trust law of, not only the 1950 contract, but also upon all of the events which took place during the 1949-50 negotiations leading up to the signing of the 1950 contract, including any conspiratorial agreement made during such negotiations, and also all agreements since then. No explanation was offered for the dramatic change of attitude of the large operators toward UMW after 1950. The record strongly invites the inference that the large operators were willing to concede UMW's every demand subsequent to 1950

because of an agreement which was reached simultaneously with the making of the 1950 contract which was, together with subsequent concessions, economically beneficial to the large operators in the competition with thin seam small mines.

The statement in the 1956 prospectus of Consolidation Coal Company (548a-549a) typifies the change in the relations between the Union and the major coal companies wherein it is stated: "No material work stoppages or unusual labor difficulties" have been experienced by the companies "since March, 1950."

There was a sharp change in the attitude of major coal companies with respect to the Union's domination of the men in the industry. From 1947 to 1950 there was a very manifest attitude on the part of the major coal companies to keep out of collective bargaining agreements language which would facilitate the Union's domination over the men in the industry. The position of the major coal companies was frequently stated during the course of bargaining sessions before 1950 (302a-303a, 309a). There was a fight over the Welfare Fund language and over the Welfare Fund itself (268a-270a). There was a fight over the Union security language in the 1948 contract (271a). There were a number of cases brought by the major coal companies before the National Labor Relations Board in 1949 (272a). Cases were brought in 1950 with respect to terminology of the proposed contract by the major coal companies (275a).

Immediately after the signing of the 1950 contract the major coal companies and the Union combined to solicit the National Labor Relations Board to terminate the cases (326a). The major coal companies have no longer been interested in the contract terminology so far as it might infringe upon the limitations contained in the labor law. This has been true even though in 1951 the labor law was

amended to make illegal union security clauses in contracts with unions which had not complied with the reporting provisions of the law. The major coal companies did not protest the union security clause even though the non-compliance of United Mine Workers of America was a matter of public knowledge (337a-338a). Mr. Lewis made it abundantly clear that there was not going to be any compliance by his Union (1235a). The major coal companies left the questions of contract terminology up to small companies sued under the Welfare Fund to conduct a scattered and losing fight on the various questions presented (1493a-1494a). This attitude is to be contrasted with the attitude of the major coal companies before 1950.

There was a marked change in 1950 in the attitude of the representatives of the major coal companies toward the smaller coal producers. Before agreement was reached with the UMW in 1950, Mr. George Love, representative of the coal companies in 1949-50, stated in those negotiations that he was representing hundreds of operators, most of them small, with their backs to the wall; that these companies had to sell their coal before they mined it; that if the cost were increased many of them would be unable to open their mines; that the small operators had no margin in 1950 to absorb any increases in cost (541a-542a). Mr. Love stated then that he was under an obligation not to do something that Consolidation Coal Company could do but hundreds of other coal companies could not afford (542a). Mr. George Love testified that it was his position in 1950 that he, as a negotiator, had to actually and honestly represent everybody, including the mines in the thin seams of coal, and in all of the various geographical districts (543a-544a).

After 1950, the representatives of the major coal companies ceased to be concerned with the ability of the

smaller companies to keep up with the increases in the contract. The labor contract costs were repeatedly increased after 1950 (400a). These increases were made after the formation of the Bituminous Coal Operators Association and the appointment of the one-man negotiator teams, and there was evident a willingness to negotiate increases year after year without waiting for the termination of the preceding contract (395a-399a).

The financial and ownership tie-ups between the major coal companies and the dependence upon the major companies of the lesser companies in the industry in the period of 1949-50 were clearly shown by Mr. Lewis (319a-324a), as stated above. Under these conditions it would have been an easy matter for the representatives of the major coal companies and the Union to reach an understanding with respect to the question of stabilization and the manner of taking care of the pressing problem of over-production in the industry.

C. The Understanding Reached in 1950 Between the Major Coal Companies and the Union Is Reflected in Later Use of the National Bituminous Coal Wage Agreement to Force Out of the Industry the Smaller and Weaker Companies and Their Employees.

In October, 1950, after UMW and the major coal companies came to terms, an International Organizing Committee was set up by the International Executive Board of the Union to promote "an intensified and integrated organizing campaign in the non-union areas of the bituminous coal industry." Under the direction of this committee and the International Officers, considerable progress was made in both the strip and underground fields of the East. Some of the non-union operators appealed to the courts for injunctive relief against the Union. Although several of these injunctions were temporarily im-

peding the campaign in certain areas, they had not appreciably affected the Union's drive, and the Union anticipated success despite these legal bulwarks (414a-415a).

This drive was conducted especially in regard to strip pit operations and the operations of the smaller mines. The Union had very little difficulty in organizing the large units of production but the Union was having difficulty in organizing stripping operations. It was the intent of the Union to organize every mine and every strip pit in the United States (415a-416a).

In 1956 the International Organizing Committee, formed in 1950, was continuing its organizing campaign. Notwithstanding the liberal use of the injunction by the courts against the Union, the Organizing Committee and the International Officers were able to overcome such obstacles and conducted a decisively successful campaign. It organized many small mines and was successful in organizing all of the major non-union operations. Its intent was to organize all of the employees of the coal industry (416a).

Mr. Lewis testified that 82% of the production was placed under the contract (428a-431a).

The drive to put all production under the contract is characterized by the Union's ignoring the basic rights of employees to select for themselves the bargaining representative who would represent them in collective bargaining agreements. The Union organizers went directly to the operators of the small companies and demanded contracts without bothering to first sign up a majority of the employees (131a-132a, 157a, 158a, 166a, 222a).

The organizing reports of the Union indicated that UMW frequently encountered injunctions in the courts in the organizing drive (414a-416a). Since this was a conspiracy case rather than one primarily based on violence,

the District Court restrained us from going into the details of violence any more than necessary to establish our contention that contracts were being forced on operators and Union membership was being forced on employees of small companies (150a). There is not the sweeping proof of waves of violence such as is shown in a case based directly on violence as in **Flame Coal Co. v. United Mine Workers**, 303 F. (2) 39. However, the reason for these injunctions is made clear from the testimony in this case and the conduct of the Union organizers shown therein.

District 19 of UMW, wherein Phillips Brothers' mine was situated, is not a self-sustaining District (232a). The International Union funnels funds into District 19 as so-called sustaining "loans" and additional funds for organizing purposes (245a-250a). Ed Daniel and Taylor Maddox were representatives or organizers under District 19. (233a). Taylor Maddox testified that the President of the District put the organizers out in a field to organize. The President did not tell the organizers what to do each day but assigned them a territory and left it to each one to outline his work, and the job of the organizer was to find the unorganized mines and go ahead and organize them. They were all experienced men (852a-854a). Many of the small mines were in isolated territory back in the hills. The organizers frequently gathered together bands of men who would go in caravans of cars to these isolated mines to organize them and the expenses of these trips would be paid by the District (855a).

The manner in which these caravans of men would carry on the organizing work with violence and threats is sufficiently reflected in this record (119a-128a, 131a-136a, 138a-144a, 149a-151a, 155a-159a, 165a-169a, 184a-190a).

When these men got into trouble because of the mob violence, funds from the District, emanating from the International Union, bailed them out (233a-235a, 249a-250a).

It is no wonder that Mr. Lewis stated, with respect to the possibility of resistance by operators to demands of the Union that "it wouldn't do them a . . . bit of good" (1242a). In the organizing drive, the larger units of non-union production resisting the drive, were bought up by the major coal companies who proceeded to place these operations under the Union contract (416a-418a, 692a-693a, 1210a).

Each succeeding amendment to the National Bituminous Coal Wage Agreement after 1950 very substantially raised the labor costs (399a-400a). These increased costs were signed by the major coal companies before the preceding contracts expired (395a-399a). Mr. Lewis testified that the increased wages and costs were "the intent of the effort" (399a).

These increases were tailored to fit the ability of the major companies to pay the increases through mechanization. Mr. Lewis stated with respect to the 1955 contract: "It is based upon the economics of the modernized industry. It is tailored to fit the future requirements of constantly progressive industrial techniques" (401a). With respect to the 1956 contract Mr. Lewis stated: "This contract encompasses all that the industry is able to pay at this time—your officers know something about this industry. We know the status, the financial standing, and the market possibilities, and the operating costs and can project them far to the future of any major coal company in this country" (403a).

Mr. Lewis further stated: "The constant tendency in this country is going to be for the concentration of production into fewer units, with the best possible equipment, under the most modern plans that our engineers can devise, with less idle day loss because the more continuous operation is geared to standard, qualified, marketing outlets and practices; that is the tendency" (408a).

He further stated: "These great combines now being formed in the industry are able to save enormous sums of money in the production of coal, in the buying of supplies, on the part of managerial ability and administration in the reduction of the idle day time, because of their ability to make contracts with the great power consuming and manufacturing industries of the country, and enabling them to plot their production with the maximum number of days of operation per year and cutting down the unnecessary idle day drag that mounts the cost of production" (404a-405a).

Mr. Lewis testified: "We have a substantial knowledge of the form, structure, reserve, markets, and financial position of each of the important coal companies in the country" (401a).

We asked Mr. Lewis if the companies we charged with having been co-conspirators in this case were not the ones "that are following this tendency of binding up large combines to take over the production of coal in this country" and Mr. Lewis replied: "They are among those who are doing that" (450a-451a).

We asked Mr. Lewis if there was not "a concern by the Union that these large combines have the ability to pay these increased wages" and he answered: "Obviously they have the ability or they would not pay it and they couldn't pay it" (411a-412a).

The record reflects the ability of the major coal companies to produce gigantic tonnages with great machines with just a handful of men, making wage increases negligible with respect to the costs of operation. Consolidation Coal Company has spent \$200,000,000 in modernizing its mines since 1947, and spent \$20,000,000 on the Loveridge mine alone (478a-479a). Consolidation has thirty-three mines in five states, twenty-one of which produce over 1,000,000 tons per year (484a). It uses continuous mining

machines which advance the face 13 feet wide and 7 feet high at the rate of 60 feet per hour, each machine producing 1,000 tons per eight hour shift (484a-485a).

Peabody Coal Company has one deep mine near Taylorville, Illinois, employing 600 employees, producing 3½ million tons per year, with complete mechanization (716a, 747a-748a). All of the other Peabody Coal Company mines are strip operations (716a). In stripping, Peabody (during the period of this case) used shovels whose dippers had a capacity of some ten to seventy yards (735a, 476a-477a). A seventy yard dipper holds 105 tons which can be picked up by one of these shovels in just a matter of seconds (735a). At its Paradise mine Peabody had contracted to use 100-yard shovels (736a-737a), and had ordered 115-yard shovels (746a). It will also use continuous miners in this operation (752a).

Recently Pittston Company opened its Moss No. 3 mine at a cost of \$50,000,000, to produce 45 tons per man per day against a national average of 11 tons per man per day. This mine has a production of 6,000,000 tons per year (487a).

All West Kentucky Coal Company mines are completely mechanized (599a).

Mr. Lewis testified that the major mines in the country are producing 28, 30 and 40 tons per man per day (1136a).

Another significant factor with respect to the execution of the repeated wage increases by the major companies is the circumstance that the major companies now obtain gigantic long-term contracts with the utility and other major markets for coal (404a-405a, 487a-488a, 590a, 715a-716a, 1271a, 1357a-1358a). These long-term contracts have escalation clauses which would eliminate these repeated increases in wage costs from being a cost factor so far

as the major coal companies are concerned (714a-715a, 728a).

We asked: "Mr. Lewis, the contract, the National Bituminous Coal Wage Agreement, contained terms which were included in each and every contract executed by the Union, with any and all coal operators throughout the country; is that not right?" Mr. Lewis answered: "That, sir, is the policy" (411a).

Mr. Widman, assistant to the President of the Union and for many years in charge of the International Organizing Committee which was formed in 1950, testified that there was "only one contract in our industry recognized by the Union—it is a matter of public record. It is not hard to find. That is it. That sets out the only wage scale we have" (786a). He further testified that there used to be differentials before in the various areas of the country. He further testified that the Union has been successful in making "the contract uniform" (786a-787a).

In the 1958 amendment to the National Bituminous Coal Wage Agreement the uniformity of the contract to be imposed on the coal production of the country was formalized in the contract itself in the following language:

"During the period of this contract, the United Mine Workers of America will not enter into, be a party to, nor will it permit any agreement or understanding covering any wages, hours or other conditions of work applicable to employees covered by this contract on any basis other than those specified in this contract."

Mr. Lewis testified that the organizers in the field were not authorized to take any less wage than was the policy of the organization (1162a).

We asked Mr. Lewis if there was not an attitude upon the part of the Union that the Union did not care whether

the smaller units could pay these increased costs and he answered that the Union could not guarantee or undertake to "become the sponsor and the protector of thousands of inefficient and ill-operated uneconomic mining units" (412a).

Mr. Lewis further testified that why some companies could not or would not pay less than the minimum wage is something that he had no knowledge on (476a).

However, he had previously stated: "We've got many units of our industry that aren't modern, with low productivity and obsolete machinery, not well financed, no marketing outlets, mining a poor grade of coal, and with inefficient management. They are just a drag on the industry. . . . More and more of the obsolete units will fall by the board and go out of production" (408a).

He further testified: "So it is with these palid, underfed, ill-nourished operators of small coal mines who cannot keep up with the economic procession nor live under the rules of competition as it now exists" (407a).

The inability of the mines in the East Tennessee field to mechanize and keep pace with the mechanization in other areas is a circumstance that cannot be disputed on this record. This arises from physical conditions with respect to thickness of seam and the rough terrain (953a-955a, Exhibits 118, 119, 120, 1664a-1666a, 1307a-1308a, Exhibits 163, 164, 1316a, 1315a).

The statistics, from the Bureau of Mines, show Tennessee has four times the number of non-mechanical mines as the average of coal producing states due to the nature of seams and terrain (1315a-1316a). Tennessee has by far the thinnest average seam of coal (1664a). Tennessee has by far the longest average haul from mine to loading point (1665a). The seams and terrain make only small equipment, such as that used by Phillips, serviceable and Ten-

nessee has practically none of the large equipment that is found in the thicker seams and more favorable terrain (1666a). Yet there are many thousands of people who are dependent upon coal mining in this area in order to survive (961a-964a, 1513a). These people are told by the UMW to operate under the terms that were designed and tailored for production with the great machines or get out of the industry. The demand is obviously an impossible one.

D. Use of the Welfare Fund in the Conspiracy and the Participation in the Conspiracy by the Trustees of the Welfare Fund.

Before 1950 when the Union was contending with the major coal companies over the question of limited work weeks and control of production the Union very plainly manifested its intent and purpose to control the Welfare Fund. As a matter of history it was this effort of UMW that caused the Welfare Fund provisions of the Taft-Hartley Act to be enacted. **United States v. Ryan**, 350 U. S. 299, 304-305, 100 L. ed. 335, 341. After 1950 an understanding and purpose on the part of the major coal companies and the Union to put out of the industry hundreds of thousands of miners through mechanization and through forcing the smaller and weaker companies to close down would clearly be facilitated by the continuance of the Union's control over the Welfare Fund. When the miners left in the industry and left in the Union membership looked around and saw thousands of their co-workers being forced into unemployment the Union's maintaining of control over the administration of the benefits of this Fund would be an important asset in keeping discipline and allegiance in the thinning ranks of Union members.

The representation of Union control over the Fund would also facilitate the drive to bring the smaller mines

under the labor contract of United Mine Workers. We have discussed in our petition in the companion case, Number 39, October 1964 term, the manner in which the Welfare Fund has been used since 1950 to force the contract on all production and without repetition we refer to that discussion, which is incorporated as Appendix II to this brief.

E. The Small Companies Who Cannot Pay the Increased Cost Under the UMW Contract Have Been Boycotted From Coal Lands and From Coal Markets by the Major Coal Companies.

The impression could easily be gathered from the testimony of the Union Officers and the statements of counsel that the land-lease provision of 1952 was carried over from earlier contracts and that it had to do with subterfuge or, in other words, it had to do with efforts of operators to get around the contract by making bogus leases to third parties.

There are two sentences in the land-lease provision. The second sentence was always in the contract beginning in 1945, and has to do with "subterfuge." The first sentence in the present land-lease provision appeared for the first time in the 1952 contract and it has nothing to do with "subterfuge." The language added in 1952 is as follows: "As a part of the consideration for this agreement, the operators signatory hereto agree that this agreement covers the operation of all of the coal lands owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this agreement, or acquired during its term which may hereafter (during the term of this agreement) be put into production" (1200a-1201a).

It will be observed that this language may reasonably be construed to cover any later operation by any party

on any lease of coal lands held by the major coal companies regardless of whether or not they are in production at the time, and regardless of how remote they are from present operations of those companies.

There are many places in the record where tremendous reserve of the best coal lands are shown to be held under deed or lease by the major coal companies. For instance, Consolidation Coal Company has 1,300,000,000 tons of reserves in six counties in Pennsylvania alone. This company has properties and mines in four other states besides Pennsylvania (484a). The Clinchfield Division of the Pittston Company, alone, in one state, has 1,000,000,000 tons of reserves in a tract of 300,000 acres (487a). In 1958, the West Kentucky Coal Company had over 1,000,000,000 tons of coal reserves (589a-590a). Island Creek Coal Company had reserves scattered in several states (776a-777a). Mr. Lewis testified that the major coal companies have vast acreages of reserve coal lands tied up (490a). The Union loaned \$1,500,000 to gather together leases on the ten foot Hazard seam in East Kentucky (530a). The provision added in 1952, called the "land-lease" provision, would bar small coal companies that cannot pay the Union scale and Welfare royalty from all this coal land.

The practical economic control which the Union holds over average mining companies that sign the contract and that have coal reserves of substantial size, by virtue of the land-lease provision, may be exemplified by the case of Black Star Coal Company. Black Star Coal Company was a Kentucky corporation and Mr. Albert B. Hill was president of that Company (668a). This company had a mine at Alva, Kentucky, just north of Tennessee. It also had 16,000 acres of coal reserves, most of which were located in other counties in Eastern Kentucky (669a). The new land-lease provision inserted in the 1952 UMW

contract made Mr. Hill go to Washington to talk to Mr. Lewis (681a). At the time the new contract came out in 1952, Black Star had new leases made out to non-union coal companies on some of its land and had a verbal agreement on two other leaseholds (682a). This land lay in an area of the coalfield where nothing but non-union operators were operating (688a). Mr. Hill conversed with Mr. Lewis at great length concerning his right to lease this land to non-union companies in spite of the land-lease provision, and after these lengthy discussions Mr. Lewis and Mr. Hill entered into a "gentlemen's agreement" that it would be all right to make the leases which had already been made and to make the leases with respect to the other two leaseholds as to which there was a verbal agreement already existing, but to no others (680a-685a).

When the next union contract came around for execution, Black Star Coal Company was confronted with the necessity of entering into new leases in the non-union area of the Black Star property which had not yet been developed at all (683a-684a). After another lengthy round with Mr. Lewis, Mr. Hill entered into another "gentlemen's agreement" that it would be all right to go ahead with these (683a). He discussed with Mr. Lewis the companies that were to be formed and the leases that were to be made (684a-685a). Mr. Hill abided by his agreement with Mr. Lewis that he would make no other leases than those which were the subject of the discussion (685a), and other companies would be rejected when applying for a lease (671a-672a).

As a postscript to this testimony, subsequently Black Star Coal Company was acquired by Peabody Coal Company (714a, 719a, 671a). After that, the matters with UMW were handled in the Peabody office in St. Louis (681a). Peabody closed up the Alva mine (720a). It

could not be operated profitably although there is sufficient coal left on the property (671a).

The application of the land-lease provision to mines operated by subsidiaries of Peabody Coal Company illustrates the manner in which that provision was used to impose the national contract of UMW upon operating units regardless of the will of the employees of those units. The Millstadt mine and the St. Ellen mine, both in Illinois, were acquired by subsidiaries of Peabody Coal Company in 1956 (718a). The Progressive Mine Workers of America is a labor organization which represents miners in some areas of the coalfields (759a). It is the principal competitor of the United Mine Workers of America (765a). Its membership consists presently of only 1800 working men (764a). It was organized in 1932 (765a). It had long represented the employees in the Millstadt and St. Ellen mines and represented them in 1957 (759a).

Peabody Coal Company received a letter from Hugh White, president of District 12 of United Mine Workers, dated July 10, 1957 (700a-701a). This letter formally advised Peabody Coal Company that the UMW contract was effective at any and all mining operations operated by Peabody Coal Company and that a compliance was expected, pointedly referring to the land-lease provision. Immediately letters were sent by Peabody and its subsidiaries to the Progressive Mine Workers notifying them that the Progressive contract was being cancelled effective September 30, 1957. At this time, Progressive Mine Workers had a valid contract at the two mines of Millstadt and St. Ellen (706a-707a). Ray Dupee was president of Progressive Mine Workers (758a). He was advised by the superintendent of Millstadt mine that the United Mine Workers were about to commence a drive on the mine and that the company would cooperate with the UMW (760a). Mr. Dupee sent letters to Peabody notifying

Peabody that Progressive had a valid contract at the two mines (705a-706a). Peabody did not reply to these letters (707a, 762a). Dupee could not reach any Peabody official on the telephone (762a). Then he received the termination of the contract from Peabody Coal Company (763a). In the meantime, Mr. McCollum, vice-president of Peabody Coal Company, gave District 12 of United Mine Workers a list of the company employees (707a). In the vacation period of June and July of 1957, neither the Millstadt nor the St. Ellen mine opened as scheduled at the end of the vacation period (767a, 771a).

Before the mine reopened, and after the 1957 vacation was scheduled to be terminated, the mine committee of the St. Ellen mine met in the mine superintendent's office. There was present at the meeting Mr. McCollum, vice-president of Peabody Coal Company (767a). Mr. McCollum was asked by a member of the committee if the men were sent out to join United Mine Workers of America. Mr. McCollum handed a letter to the pit committee, this being the previous letter which was received from the president of District 12, United Mine Workers, and was the letter in which Peabody was advised that it was expected to comply with the land-lease provision. Mr. McCollum told the mine committee members that they would not want trouble at their 27 other mines by trying to work these two mines. Mr. McCollum told the mine committee that the Progressive Mine Workers had been notified that on the expiration of the Progressive Mine Workers' contract there would not be another Progressive Mine Workers contract executed. The mine committee reported these matters back to the Progressive Local at the next meeting (768a-770a).

In the meantime, at the Millstadt mine, the pit committee of Progressive Mine Workers Local there held a meeting at the superintendent's office after the vacation period was scheduled to have been terminated. The super-

intendent of the company told the pit committee that the company could not operate these two mines and shut down 27 other mines. The superintendent would not comment upon the question of the pit committee as to whether the mines were not going back to work unless the men joined the United Mine Workers. The superintendent produced a copy of the District 12, UMW letter to Peabody which stated that Peabody was expected to comply with the landlease provision and the superintendent said "that's the way it is." The pit committee reported these matters back to the Local at the next meeting (771a-774a). Peabody Coal Company recognized United Mine Workers at St. Ellen and Millstadt mines without any election (719a).

It is true that the Court of Appeals for the Seventh Circuit has ordered Peabody Coal Company to conduct elections at these two mines. However, this is small consolation to the employees of the St. Ellen mine, because St. Ellen was closed permanently and the equipment was stripped out of it (711a). Here, again, as in the case of the Alva mine, Peabody acquired, and closed a large mining unit that was causing UMW trouble. The St. Ellen mine was the largest mine with which Progressive Mine Workers had a contract (765a).

The protective wage clause added in 1958 effectively bars from the markets the coal of small mines that are unable to pay the costs contained in the National Bituminous Coal Wage Agreement. The protective wage clause says that the signatory operators will not buy, sell or deal in any way with coal mined by companies which do not pay the same labor costs as are set forth in the National Bituminous Coal Wage Agreement (1205a).

The major coal companies, signatories to the National Bituminous Coal Wage Agreement, are bound by the protective wage clause. These companies sell to the great markets for coal under large, long-term contracts. The

record has numerous references to these kinds of contracts.

The big combines referred to by Mr. Lewis make these kinds of contracts (450a-451a). The Pittston Moss No. 3 mine sells 1,250,000 tons per year under long term contract to American Electric Power Company, which is situated next to the mine (487a-488a). Peabody Coal Company has many large, long-term contracts (1271a). Peabody Coal Company organized an operating company, Simeo-Peabody Coal Company, to sell under term contract to Columbus and Ohio Electric Company (714a). Peabody Coal Company has an enormous long-term contract that covers three decades with the Commonwealth Edison Company (715a-716a). Peabody's contract with Tampa Electric Company is a twenty-year term contract (727a). The Consolidation Coal Company witness, P. B. C. Smith, testified that the electric utility markets, which are the principal markets for coal, are under long-term contracts for their coal. He testified that one reason for this is that in building steam plants the utilities must issue debentures, the sale of which requires that the utility make term contracts for its coal in order to establish costs; and the other reason is that these costs must be established in order to fix electricity rates (1357a-1358a).

These term contracts with the major markets include escalation clauses which provide that the price of coal under the contracts will be increased as costs, including labor costs, are increased over the years (715a, 727a-728a, 1454a). These escalation clauses explain, in part, why the major coal companies are in a better position to grant repeated increases to United Mine Workers.

The practice of major coal companies buying coal from smaller companies to apply on term contracts with the major markets is barred by the protective wage clause unless the small company has the ability to pay the labor

cost contained in the Union contract. Mr. Lewis demonstrated the dependence of smaller companies on sales to the major companies as far back as 1949 (320a-323a). The major companies have had the practice of frequently buying coal from other companies (1264a, 1360a). This market has been eliminated for those companies that operate under conditions that make it impossible to live up to the UMW contract.

Also of concern to small companies in the steam-utility market is the buying by the Union of stock of large coal consuming utilities including Cleveland Electric Company, Kansas City Power and Light Company, Union Electric Company of St. Louis, and Tampa Electric Company (580a-582a). How far the Union power will be exerted in this direction remains to be seen.

Of additional concern are the organized pensioners' drives to compel power companies to buy coal from approved mines. These have been discussed in Appendix II.

F. The Union Participated as Owner and Investor in Major Coal Companies in the Taking Over of Markets by the Big Combines.

While the Union was turning loose mobs on the coal fields and imposing conditions upon the small coal companies which were prejudicial to the small companies in the competitive race with the major coal companies, the Union itself participated in the taking over of markets of the country by the big combines as an owner and investor in some of the major coal companies. The UMW's position in this case is not confined to that of a labor union representing employees. It had many millions of dollars invested in major coal companies that were trying to take the markets being served by Phillips Brothers and other small companies of the area. While slanting labor policies

to cripple small, thin seam, companies and aid the major companies, UMW stood to gain directly as owner and investor. Mr. Lewis testified that West Kentucky Coal Company and Nashville Coal Company were a part of the big combines being formed to take over the production of coal in this country (450a-451a). These investments were a matter of rumor and UMW successfully resisted our efforts at discovery until after the passage of the mandatory financial reporting provisions of Landrum-Griffin. Thereafter the Trial Court permitted our discovery of this subject.

¶ United Mine Workers of America used funds from its treasury to make investments in the West Kentucky Coal Company. Subsequently, it made investments in Nashville Coal Company. Of course, these funds came from the members of the Union who were working in the industry, including employees of the small mines and including, specifically, Phillips Brothers Coal Company employees (1162a-1163a). The record shows, as hereinafter described, that these investments have in no wise benefited employees in the small mines but that they have, rather, been disastrous to them, particularly those in areas of thin seams. The UMW endeavors to explain these investments by stating that it "had idle money that they wanted to put to work to invest." Yet, the record discloses that, during the time this "idle money" was being invested, UMW was making special assessments on all of its members, including Phillips Brothers' and other small company employees, upon the representation that UMW's funds had been depleted by wage negotiations and that additional sums were needed to replenish the Union treasury (1163a).

Mr. Lewis testified that these investments began about 1951, and that they were made to benefit Union members (1123a). He also testified that the investments were made to raise the employees out of their servitude (1126a). He

testified that the employees of West Kentucky Coal Company had always worked under substandard conditions. He said with respect to West Kentucky Coal Company that before these investments were made, "wages were always substandard, and the conditions of employment were always not up to the normal of the industry" (1164a).

Mr. Mark Eastin was president of West Kentucky Coal Company after UMW made its investments in that company and had been in the management of that company since long before. He testified in a deposition that West Kentucky Coal Company had a Welfare Fund for its employees into which the West Kentucky Coal Company paid a royalty in the same amount as that paid by signatory companies to the United Mine Workers Welfare Fund, and West Kentucky maintained this fund prior to ever signing any agreement with United Mine Workers (618a). Mr. Eastin further testified that before the Company ever signed any United Mine Workers contract it paid a wage scale equal to or higher than the scale of United Mine Workers (618a). On being questioned about this testimony of Mr. Eastin, and the inconsistency with Mr. Lewis' testimony about previous substandard wages at West Kentucky, Mr. Lewis resorted to the statement that the UMW purchase of West Kentucky had benefited the men because the company had previously operated a company store (1164a-1165a).

We do not believe that the jury was bound by Mr. Lewis' foregoing statement as to the reason for the investments in West Kentucky Coal Company. The number of employees employed by West Kentucky Coal Company has certainly not increased so as to spread employment (615a-616a).

We believe the jury was entitled to the conclusion that the Union officers made the investment simply as a busi-

ness arrangement, as Mr. Lewis indicated in later testimony (943a, 1125a).

The Union acquired outright some 85,400 shares of West Kentucky Coal Company common stock. It also acquired outright the entire 50,000 shares of West Kentucky Coal Company preferred stock (500a). In addition it held many thousands of common shares as so-called "collateral".

West Kentucky Coal Company had 857,264 shares of common stock outstanding in 1958 (591a). The shares which the Union bought outright, plus the shares which it held as collateral on the so-called "loans", far exceeded one-half of the outstanding shares (499a-500a). (Also see Exhibit 48, 1639a, the chart showing the interest of the Union in West Kentucky Coal Company and Nashville Coal Company.) In addition the preferred stock, owned entirely by the Union, is voting stock (602a-603a).

The record shows that the so-called "loans" were not really loans but rather direct investments by the Union in the West Kentucky Coal Company and Nashville Coal Company, regardless of UMW's stubborn insistence that they were loans in the true sense. Most of these loans were to Mr. Cyrus Eaton and companies owned by him or his children or business associates (550a-552a, 499a-500a). These loans are set forth in 499a-500a, and Exhibit 48, 1639a, 503a-506a. The notes evidencing these transactions are in the record at 510a-518a, and are referred to frequently in the deposition of Mr. Cyrus S. Eaton, 556a-586a, and of Mr. Barnum L. Colton, President of the National Bank of Washington, 623a-646a.

The Union officers acted as Trustees of Union funds in making these so-called loans (488a). All of these loans were made on notes which relieved the recipient of the loans from personal liability upon surrender of the shares

of stock held as collateral on each of the loans (488a-489a). The notes were renewed annually (557a, 575a). There was no understanding as to how long the renewals of the notes would continue year after year (575a). If the stock held as collateral declined in value there was no demand for additional collateral (570a-571a). If no dividends were paid on the stock, no interest was paid on the notes. This was the understanding (573a-574a). Several of the notes provided that one-half of the dividends on the stock held as collateral would be payable as interest on the notes (571a).

Mr. Lewis testified that it was his belief that these so-called loans would prove immensely profitable to the Union in a financial sense (493a).

After a great deal of confusing testimony delving into the nature of these transactions, Mr. Lewis' final testimony upon these so-called loans was that Mr. Eaton was invited "to make a joint venture with us in the West Kentucky purchase of stock, and we loaned him some money to buy stock." He also testified "any profits occurring from the joint enterprise in the investment were to be split mutually, fifty percent to each. We could not ask Mr. Eaton to do so and lose his own money, so we divided the profit like joint partners in any enterprise" (1125a).

We believe that the jury was entitled to the conclusion that the Union officers, in making these so-called loans, entered into a joint business enterprise with Mr. Eaton in making direct investments in West Kentucky Coal Company and Nashville Coal Company, as well as in C&O Railway and other companies, just as Mr. Lewis finally testified. The transactions are explainable by some sort of joint enterprise except one transaction that does not fit into this pattern with respect to "loans" on C&O Railway stock, this being the taking down of some \$400,-

000 of this collateral stock which Mr. Eaton testified was taken by one of his corporations (565a-568a). He testified that none of the Union officers received any part of this collateral that was taken down and that no audit was made by Union auditors of this transaction (568a).

So-called loans were made to other individuals. The collateral stock held by the Union on the so-called loan to UMW's attorney, Harrison Combs, was foreclosed and is now owned outright by the Union (512a-513a, Exhibit 53, Letter 12/15/59 and Memorandum 12/30/59). The so-called loans to Mr. Colton, president of National Bank of Washington, on West Kentucky Coal Company stock follow the same pattern as the loans to Mr. Cyrus Eaton and must be taken to be the same kind of joint enterprise as was engaged in with Mr. Eaton. Here, again, there was no personal liability on Mr. Colton (643a). Mr. Colton did not even know about Nashville Coal Company (642a) and he attended no stockholders' meetings of West Kentucky Coal Company (644a). His notes are demand notes and there has been no demand even though the stock was purchased at prices of \$35, \$30 and \$25 and the stock is now selling for \$10 to \$12 (643a). No interest was provided for except the payment over to UMW of any dividends that were received (644a).

The Union pledged \$5,200,000 of its assets to support a loan by the National Bank of Washington to West Kentucky Coal Company in 1957. This transaction is interesting, shedding light upon who was actually running the West Kentucky Coal Company. The statement of the Union is that it gave this financial assistance "at the request of West Kentucky Coal Company" in order to "expand its holdings and operations" (501a). The loan made by the bank was "at our request," according to the letter written by the Union to the National Bank of Washington (644a-645a). The Chairman of the Board of the Company,

Mr. Cyrus Eaton, testified that he had no knowledge of the Union's pledge of \$5,200,000 of its assets with respect to this bank loan (584a). Mr. Mark Eastin, president of the company, testified that he, likewise, had no knowledge of this transaction (1462a).

In the period that West Kentucky Coal Company, after the acquisitions of stock by the Union, was taking most of the largest TVA term contracts and was placing coal on the spot market of TVA at low and dropping prices in tremendous tonnages, the profit of the West Kentucky Coal Company showed a great decline and resulted in losses in 1958 and 1959.

In 1950, the last year before the Union began acquiring stock in West Kentucky Coal Company, the net income of the company was \$5,645,919. This was according to the annual statement of the company in 1951. In 1951, according to the same statement, the net income was \$4,223,814 (1461a).

According to the annual statement of 1958 of the Company (Exhibit 69, 588a), the West Kentucky Coal Company had a profit of \$1,376,377 before taxes in 1957, and in 1958 it had a loss of \$367,516 before income tax credit was applied (590a).

According to the annual report of the company in 1959 (609a), the company suffered a loss of \$435,841 before income tax credit.

The decline in the coal business, suffered by the country as a whole from 1957 to 1959, does not account for the losses of the company. In 1958 the national production was down 18.8% from 1957 whereas West Kentucky Coal Company's production was down only 9.5% (589a). In 1959 West Kentucky Coal Company's production increased by approximately 500,000 tons as compared to a

drop in the national production (609a). The financial strength of the Union was a necessary support to keep the coal from this company flowing into the markets at such prices as were required to take the contracts.

We have given above some of the instances of the exercise of its financial strength by the Union in the coal industry. We make no representation that we have fully explored this field. We have done nothing to explore such companies as Lewmurken, Inc. (506a) and Hannah Company (597a). We have not explored the use of the financial resources of the UMW-owned National Bank of Washington in the coal industry, because there was a refusal on the part of witnesses to divulge this information (645a-646a). To pursue discovery in these fields would require lawsuits in a foreign jurisdiction which our small, broke client could ill afford. However, we should discuss briefly the National Bank of Washington and loans in industry which are readily apparent in the record. The National Bank of Washington made the \$5,200,000 loan to West Kentucky Coal Company heretofore discussed (501a). The bank made the loan mentioned hereinafter to North Fork Coal Company of \$1,500,000 (650a-651a). The witness Haley, secretary of the National Coal Association, treasurer of Coal Exporters Association, and vice-president of National Council of Coal Lessors, testified that these associations had their accounts in the National Bank of Washington (652a).

The United Mine Workers held 80% of the capital stock of the National Bank of Washington before the acquisition of the larger Hamilton National Bank of Washington (625a). The Union made so-called "loans" of many millions of dollars (1642a) to Mr. Colton, president of the bank, these loans following the same pattern as the loans to Mr. Eaton and to Mr. Colton with respect to West Kentucky Coal Company stock. The purpose was to acquire the Hamilton Bank (626a-627a). At the conclusion of ac-

quisitions of Hamilton National Bank stock by Mr. Colton with these "loans," Mr. Colton held 80% of the stock of the Hamilton National Bank (638a). Thereupon the Hamilton National Bank was merged into the National Bank of Washington. The National Bank of Washington also acquired Liberty National Bank of Washington (624a).

Returning to the part the Union-financed companies have played in the drive for markets, when West Kentucky Coal Company acquired Nashville Coal Company, West Kentucky assumed Nashville's contract with Tampa Electric Company to supply the coal requirements to that utility. Nashville Coal Company was acquired by West Kentucky October 1, 1955, and the contract with Tampa was to commence in March, 1957 (1436a). West Kentucky Coal Company had many things to do in order to get ready to ship coal to Tampa and it was crowded for time to accomplish this, although it began to get ready immediately upon acquisition of the Nashville Coal Company (1436a-1437a). These matters particularly pertained to the preparation of water loading and unloading facilities on the lower Mississippi and at Tampa Electric Company.

When time came to ship on this contract West Kentucky Coal Company reneged and claimed that the contract violated the antitrust law, because it had the exclusive right to supply the needs of the Tampa Electric Company utility (912a-913a). This was West Kentucky Coal Company's idea and not that of the Tampa Electric Company, and it was West Kentucky Coal Company's lawyers who came up with an opinion concerning the antitrust law violation (1438a). Vice-President Hoffman of West Kentucky Coal Company testified that the only consideration with West Kentucky Coal Company was that the contract was illegal under the antitrust act (1413a). President Eastin of West Kentucky Coal Company, testified that there were factors in the contract that were not satisfactory to West Kentucky Coal Company (1438a). It developed in Mr. Eastin's

testimony that the principal concern of West Kentucky Coal Company was the escalation provision in the old contract which tied price increases to a government index based upon average manufacturing wage increases rather than tying the price increases to wage increases in the coal industry (1454a). It is to be borne in mind that after the Nashville contract was signed, wage increases were granted to United Mine Workers in 1955 and 1956, and there was a later wage increase in 1958. A change in the escalation clause would affect the price of coal under the contract. It is to be borne in mind also that at the time West Kentucky refused to ship coal to Tampa because of these matters, West Kentucky had already spent considerable money and time in getting ready to ship and any other party who was interested in shipping coal to Tampa would have to likewise spend a good deal of time and money in doing so (1455a). West Kentucky was making a demand for more money with what seemed to be a lock on the market.

But, in the meantime, a rail shipper came in and obtained a reduced rail rate from East Tennessee and South-eastern Kentucky and commenced to ship coal by rail into Tampa Electric Company (918a-920a). It was under this arrangement that Phillips was able to ship coal to Tampa Electric Company (918a, 860a-861a).

Then Peabody Coal Company came into the picture. The witness Amos, the rail shipper to Tampa Electric Company, testified that he obtained a term contract from Tampa Electric Company December 23, 1957, for the requirements of the Gannan Plan of Tampa Electric Company amounting to very substantial tonnage (920a). He testified that shortly after this contract was disclosed to UMW lawyers, West Kentucky Coal Company removed the representative of that company who was stationed in Tampa and a representative of Peabody Coal Company was moved into Tampa at which time officers of Peabody showed up on the scene in Tampa (921a).

The witnesses of Peabody Coal Company and West Kentucky Coal Company testified that West Kentucky resisted the effort of Peabody Coal Company to come into the Tampa market and would not even lease the coal unloading facilities at Tampa to Peabody (1261a, 1439a-1440a). Mr. Mark Eastin of West Kentucky Coal Company testified that when Peabody came into Tampa, West Kentucky Coal Company did not like it; that West Kentucky had bought that business and had pioneered it and they didn't like it when Peabody meddled in it; that they didn't want Peabody moving coal to Tampa (1439a). It is to be borne in mind that at the same time, West Kentucky Coal Company was basing the Tampa lawsuit entirely on the proposition that if West Kentucky was entitled to the whole Tampa market this was illegal and contrary to the antitrust law (913a).

At any rate, the following are the net results of the situation and the deals that were made by West Kentucky Coal Company and Peabody Coal Company.

Peabody Coal Company obtained a contract from Tampa Electric Company on February 16, 1959, to begin in October 1959, for a twenty year term to ship coal by water to Tampa at a price of \$3.70 f. o. b. the mine, with a coal industry escalation clause (726a-728a). Peabody Coal Company leased the water transportation facilities of West Kentucky Coal Company (604a, 729a, 1264a). West Kentucky Coal Company was given the right to ship one-half of the coal under the Peabody contract with Tampa (606a, 730a, 1264a, 1440a). The Peabody contract shared by West Kentucky paid \$3.70 per ton at the mine, whereas, the old contract of West Kentucky, which it refused to ship on, would have paid \$3.20 per ton at the mine (1413a). The tonnage being shipped into Tampa by the rail shipper in which Phillips previously participated, has been drastically reduced (923a, 1661a, 926a). The rail shipper has been compelled to reduce his price and obtain a reduced

rail rate (924a). This is because the Peabody Coal Company and West Kentucky Coal Company coal being shipped by water to Tampa is taking the business (926a-927a). Phillips Brothers has not been able to ship any coal into Tampa since Peabody started coming into that market (858a-862a).

When the new steam plant at Memphis was opened up, four companies were involved in the coal contracts which were awarded, these being West Kentucky Coal Company, Peabody Coal Company, Pittsburg-Midway Coal Company, and Kirkpatrick Coal Company (606a, 730a).

The Peabody Coal Company witness, Jewell, testified that Peabody Coal Company officials may have talked to representatives of Kirkpatrick, West Kentucky and Pittsburg-Midway after the Memphis invitations came out and before the bids. He testified that the Memphis officials wanted to favor certain people with the business and that discussions may have been had. He said: "It would be a little natural because down there we run together down there and have a drink or two together and you get pretty talkative. We might have talked to any of them." He testified that "the competition was so hot that they split it up. We had so many friends behind us all that they split it up" (1277a). Mr. Jewell testified that Kirkpatrick Coal Company did not have an order but that they assisted Peabody Coal Company in getting its order and assisted in the administering of the contract and received a commission from Peabody Coal Company for this service (1278a).

Mr. Eastin of West Kentucky Coal Company testified in his deposition that Kirkpatrick Coal Company had an order on which West Kentucky Coal Company was shipping to Memphis (606a). He further testified that West Kentucky Coal Company was also shipping on the Peabody Coal Company contract with Memphis (606a-607a). Later,

Mr. Eastin testified that West Kentucky Coal Company's own order with Memphis Power Company was for 25,000 tons per month and that Peabody Coal Company and Pittsburg-Midway also had similar contracts with Memphis (1440a-1441a). He, again, testified that West Kentucky Coal Company was shipping on the Peabody Coal Company contract with Memphis (1441a). Mr. Eastin testified later that he has learned since the awarding of the contracts that Kirkpatrick Coal Company was a representative of Peabody Coal Company in the awarding of the Memphis contract (1458a). Mr. Eastin had testified that Kirkpatrick also represented West Kentucky Coal Company in obtaining that contract from Memphis. "They acted as sales agents in the thing. . . . [W]e agreed for their help in selling the order that we would pay them, I think it was 7½ cents a ton as a commission on one-third of our award" (1441a).

We believe that there is enough evidence here to show that, in spite of the previous testimony of Mr. Eastin to the effect that Kirkpatrick Coal Company actually had a separate order, Kirkpatrick really was an agent taking three orders—to Peabody Coal Company, West Kentucky Coal Company and Pittsburg-Midway Coal Company, and that Kirkpatrick Coal Company handled the matter for all three and that when the bidding was done and the splitting up of the awards was made that Kirkpatrick acted for all three companies. This is an example of how Union-financed companies work together with other major companies to take the contracts.

G. The Conduct of UMW Has Not Been Motivated by Concern for the Interests of Its Members; the Results of the Conspiracy Show Those Who Have Benefited Are the Major Coal Combines.

The Union officers and Union Welfare Fund trustees are aware of the misery in the coal fields. Mr. Lewis testi-

fied that hundreds of thousands of miners had been made idle (412a). Miss Roche testified that the most distressing problem in the coal fields is lack of work—unemployment (104a). In 1949, there were 433,698 men gainfully employed in the bituminous coal industry (Exhibit 156A, 1724a). In 1960 there were 160,200 men employed in the industry (1217a). Virtually two-thirds of the men have been driven out of the industry during the course of this conspiracy.

The situation in the Tennessee coal fields was so bad that the Department of Employment Security of the State made a special report in 1957 upon this subject (961a-964a, 1513a). There are no other jobs open to the ex-miner. The unemployment figure in all coal counties climbs higher every year (961a-964a, 1513a).

The International Union officers received a letter written by the Jellico, Tennessee, Local of the Union to the President of the International Union (996a-997a). This letter advised that 2200 miners were out of work in Campbell County, alone, and that the only employment was in the small underground mines and in the strip mines, which could not pay the contract terms. It stated that an ex-United Mine Worker member would not be received in any other trade. The Union officers are on notice of these things.

Also, the Union officers have received notice from the men in the big mechanical mines as to the effect of the policy of the Union on them. Here the members attack the Union policy of not seeking shorter hours in the mines where the large machines are handled by a few men. Shorter hours would increase the cost of the mechanical mine. It would be spreading the work, a program which the Union agreed not to pursue in 1950.

In the 1956 Convention Delegate Brown said: "I think that according to the hazards in the mining industry and

“the fumes and the noxious gases that we should now try to start negotiating and shorten our hours per day.” Delegate Croyle said: “Just awhile ago Mr. Lewis said that the United Mine Workers cannot be destroyed by the Democratic Party, the Republican Party or the Communist Party. Yet he would bring the machinery into the mines without shortening the working day and they won’t have to destroy us. There won’t be any of us left” (433a). Delegate Matula said: “We jump on a belt line and ride maybe a 1000 or 2000 feet, put a respirator on and go up to the face and work. When we grab a drink of water or bite to eat, there is a man standing behind us with a stop watch. We work a machine and try to keep up with that machine. I wonder which wears out first, the man or the machine. In our mind a shorter work day would be of much greater benefit to us than a wage increase” (436a).

Delegate Dugan said: “These fellows at the faces are wearing masks and they are not getting the air. The heat is great from these machines and it is deteriorating their health” (438a).

In spite of these and many other similar protests, the 1956 and 1958 contracts were negotiated by the Union and the results were more increases in the wage without any reduction in the working time of the men working with the machines. Many local Union delegations have spoken out on this issue but the Union has not said a word since 1950 about shorter hours as an issue in a bargaining conference.

We think the jury was entitled to conclude that the purpose of the Union, in bargaining sessions since 1950, has not been centered on benefit to the men in the industry but has been to carry through on an arrangement made when UMW switched its policy in 1950. Increasing the wage rate hurts the small companies which largely

use men rather than machines. Reducing the working time means additional costs upon the major coal companies. It would mean a spreading of the work, the approach to the over-production problem which the Union abandoned in 1950 (440a) and has not even mentioned since.

The self-appointed power of the Union's International Executive Board (441a) and the lack of autonomy in districts of the Union (443a-444a) enable the Union officers to control the direction of Union policy.

With respect to these events on operating units in the United States, Exhibit 149A (1717a), shows that the mines in the category of middle-sized to small, have suffered greatly during the course of the conspiracy. Class 2 mines dropped from 27.3 percent of the production in 1949 to 19.2 percent; Class 3 mines dropped from 16.1 percent to 9 percent and Class 4 mines dropped from 10.9 percent to 6.6 percent. The very small mines of the country, as shown on this Exhibit, have almost held their own, although they have dropped slightly.

The picture in Tennessee has a somewhat different complexion. There are no Class 1 mines (mines producing in excess of 500,000 tons per year) in Tennessee (Exhibit 150A, 1718a). Exhibits 121 (1667a) and 150A both show that the Class 2 mines in Tennessee (the largest mines in the State, being 5 in number) have held their own in the State. Two of these mines are the Pittston Company mine and the Consolidation Coal Company mine (956a, 1363a-1364a). Exhibit 150A shows that the smaller mines, Classes 3 and 4, have dropped enormously in the period of the conspiracy. The very small mines have increased in Tennessee. This is because the middle-sized mines, being the old railroad tipple mines of the State, employed relatively large numbers of men and when they were closed, it threw great numbers of men into unemployment.

ment unless they were able to get jobs in very small mines in their vicinity. Many of these men opened up their own mines in partnership with each other in order to gain a livelihood (910a, 957a-958a, 1064a, 1316a). The identity of these small units of production frequently changes and they come and go constantly (850a, 957a). These are the creatures of the desperate economic plight confronting the unemployed miners.

It is the closing of the middle-sized rail tipple mines of the State, throwing great masses of men out of work, that has brought the havoc to the Tennessee coal fields. This picture is shown in various places in the record. The Phillips' employee, Arlo Hutson, testified that he previously worked in the Blue Diamond Coal Company's Royal Blue Mine in Campbell County, which was closed, throwing 400 men out of work. This mine had a contract with United Mine Workers (972a). The District 19. organizer, Taylor Maddox, testified about some of these conditions at 846a-850a, with respect to the closing of the middle-sized mines of the State. He stated that the ABC mine at Monterey, the Fentress mine at Monterey, the McCoy mine in Scott County, the Glenmary mine, the Gilchrist operation at Robbins, Osborne Mining Company in Jellico, the Morley. mine of New Jellico Coal Company, the Hickey mine at Careylville, the Vasper mine at Careylville and the Blue Diamond Coal Company mine at Eagan were all abandoned.

The movement of men from these tipple mines over into the very small classes of mines is shown very graphically on Exhibit 152A (1720a), which shows that in 1953, three Class 3 mines and six Class 4 mines, in Tennessee, went out of business. In the same year some 180 were added to the number of the smallest class of mines (Class 6 category), the increase being from 279 to 453. The Bureau of Mines witness produced by UMW agreed that

this shows the movement of the men thrown out of the abandoned middle and small sized mines over into the very small mines to gain a livelihood, many of them opening up mines in partnership together (1316a).

It is upon these kinds of operations that the United Mine Workers of America would impose the National Bituminous Coal Wage Agreement, which was tailored to meet the ability of the great mechanical mines of the country to pay, mines producing as much as 45 tons per man per day.

The record shows that Mr. Lewis' statements that there would be a concentration of production into fewer and fewer units and that more and more of these smaller and weaker companies would be put out of the industry have come true (408a). The Union's problem has been in policing the unemployed former members who seek sustenance for themselves and families in very small mines that come and go. The repeated waves of mob violence have been a partial solution, but this could hardly be described as a traditional labor union activity.

Mr. Lewis testified that the big companies that we charged as being co-conspirators are among the big combines that are being formed to take over the production of coal in this country (450a-451a). In the period of this case Consolidation Coal Company acquired Jefferson Coal Company, Jamison Coal & Coke Company, Pocahontas Fuel Company, Mathies Coal Company, Harmer Coal Company (532a-533a). The Pittston Company has acquired Clinchfield Coal Company, Amigo Smokeless Coal Company, Minter Coal Company, Banner Fuel Company and Elk River Coal & Lumber Company (690a-691a). Peabody Coal Company has acquired the large Sinclair Mining Company property, Midwest Radiant and Perry Coal Companies, Poplar Ridge Coal Company, Peabody Southern Coal Company, Midco mines, River Queen Coal Company,

Kay Coal Company, Alva Coal Company and Simeo-Peabody Coal Company (714a-718a). Island Creek Coal Company acquired Pond Creek Coal Company, Red Jacket Coal Company and Algomma Coal & Coke Company (776a-777a).

H. Impact of the Conspiracy on Phillips and on the Markets It Supplied.

1. How the Phillips' Contract With UMW Came About.

As heretofore stated, the International Union established an International Organizing Committee in October of 1950, which conducted an intensified organizing campaign throughout the bituminous coal field, particularly in the unorganized section of the country. This campaign was highly successful in spite of the repeated use of injunctions in the courts (414a-416a).

In 1953 such a campaign was going on immediately north of Campbell County, Tennessee, in southeastern Kentucky. The drive was headed into Campbell County, Tennessee (178a). The Union Organizer, Ed Daniel, made several trips to the Phillips mine to talk to the mine officers (222a-223a). The partners reached the conclusion that they would have to sign the contract or quit, and they couldn't quit because they had everything they owned invested in the mine (178a). James Pennington testified that they were afraid not to sign the contract, and this was a man who participated in seven major campaigns in World War II in North Africa, Sicily, Italy and Europe (223a-224a).

The United Mine Workers of America had absolutely no authority to represent the employees of Phillips in the making of a collective bargaining agreement with that Company. Daniel made no representation whatsoever of representing the majority of the employees (179a). The partners had no reason whatsoever to believe that any of

their employees were members of the Union (183a). The employee, Arlo Hutson, testified that he had been a member of the United Mine Workers but was not a member after 1952. No one asked him to join the Union after he came to work for Phillips until the incident in 1955. No representatives came to see him. He authorized no one to sign a collective bargaining agreement for him (972a). The employee, Arvin Hutson, belonged to the Union at the time he came to work for Phillips, but he was told to turn in his card because he was working for a non-union mine (976a). The employee, Ralph Phillips, testified that he was never a member of the United Mine Workers until the incident in 1955. No authority was given by him for the Union to represent him in a collective bargaining agreement (981a, 982a).

At the time Daniel talked to the three partners about signing the contract he represented that Phillips could work out its own working arrangements with its employees and pay whatever it could on the Welfare Fund (179a, 223a). This was the testimony of the partners. Mr. Daniel did not testify in the case. It must be acknowledged that the partners did not take much stock in what Mr. Daniel said but that the real reason they signed was because they had to, or go out of business, and they could not go out of business with the investment that they had with all of their finances tied up in the Company (178a, 1466a).

We do not believe that it is necessary in this brief to dwell upon the campaign of violence which occurred at the time the employees were compelled to join the Union in April, 1955, months after the signing of the contract. We make reference here to the pages of the record where this testimony occurs (119a-129a, 131a-136a, 138a-143a, 149a-151a, 155a-158a, 166a-168a, 184a-189a, 224a, 964a-966a). The mob visited the property of Phillips in April, 1955 and told Raymond Phillips to keep the mine shut

down until he was told he could open it up. He was told to have all of the employees join the Union (186a-187a, 964a-966a). Subsequently, the partners went to Jellico to see Mr. Daniel and were told by him that they could not expect to run the mine when the men did not belong to the Union. They were told to go to Middlesboro and talk to the District Officers (187a-188a, 274a). They went to Middlesboro and talked to Albert Pass, Secretary and Treasurer of District 19, who was told about the visit of the mob to the tipple and that Mr. Daniel had told them to come see him. Mr. Pass told them to have all of the men join the Union and pay the back Welfare royalties and then they could go back to work (188a, 224a). Mr. Pass testified that the Phillips' people did come to see him, but he said that there was no discussion about the mobs. That was about the only difference in his testimony from that of Phillips' partners (236a-237a). Even if there were no discussion about the mobs Pass acknowledged that stories about the mobs were spread all over the newspapers (237a), and the conclusion by the jury that he at least knew why these people had come to see him could hardly be questioned. Arrangements were made to have an organizer come to the tipple to sign the men up, and Mr. Maddox and Mr. Daniel did, in fact, come to the tipple and sign the employees up, including two of the partners (188a-189a, 224a-225a, 842a-843a, 974a, 978a-979a, 982a). The organizers advised that everybody had to join except one man who would be the boss, and that was Raymond Phillips (225a). The employees signed up because they had to before they could go back to work (973a, 977a, 982a).

2. The Suit Brought Against Phillips by the Trustees of the Welfare Fund.

The stipulation entered into at the beginning of the trial shows that the Trustees' claim against Phillips for

back royalties amounts to approximately \$56,000. Phillips was in business from the middle part of 1952 through 1958. It had a loss of \$2,438.04 in 1953, and a profit of \$9,554.00 in 1954 (218a). It had a profit of \$28,542.19 in 1955 and a profit of \$17,325.79 in 1956, a loss of \$20,385.20 in 1957 and a loss of \$12,311.28 in 1958 (207a, 218a-219a, Exhibits 13-21, 1591a). Thus the Trustees' claim for Welfare Fund royalty against the company exceeds its combined profits for its entire life without even subtracting any part of the losses which it suffered during three of the six years. This is a good example of the manner in which the wage contract, with its high costs, could be used as an instrument to drive smaller companies out of the industry. It is this type of situation to which the Trustees gave no consideration and upon which they would give no settlements except upon the basis of the payment of the last cent (see Appendix II).

3. The Squeeze Exerted on Phillips in the Coal Markets.

a. The Prospects of Phillips When It Started Business in 1953.

Each of the three partners in Phillips invested \$9,000 in the capital of the company (175a). They obligated themselves personally for well over \$100,000 for several expensive pieces of equipment (211a). These partners did not sit in the office running a coal company. They were actually laborers on the job. Raymond Phillips was the only mechanic in the company and had to attend to all of the equipment, in addition to bookkeeping chores (202a). Jim Pennington, a former UMW member, worked at the tipple weighing, loading and crushing coal. Burse Phillips, who died shortly before the trial, worked in the strip pits operating equipment (230a).

Phillips had two kinds of markets. They had the domestic market, and this was the coal that was hauled

from the tipple by truck (208a). Also, there was steam coal produced by Phillips, and this was the coal from the same mine that was crushed to steam size and hauled from the tipple by rail (209a). Phillips had a separator which separated the domestic sizes of coal, and it conducted a semi-retail, semi-wholesale, domestic business and received very good prices for this coal. The Union's witness, Elliott Adams, testified that Phillips had a relatively high percent of its coal sold on the domestic market in comparison with other companies (1471a). This is to be contrasted with the testimony of the Union's witness, Scollon, who testified that the domestic market was one of the two hardest hit, as far as the country as a whole was concerned (1291a).

In 1953, and prior years, the steam market in East Tennessee was not so good. The TVA steam plants had not yet been developed to any great extent, and electricity in the valley was generated by the large TVA hydro system (210a, 927a). However, before 1953 the price on the steam market was well over \$4.00 in this area (895a, 994a). With respect to overall prices in Tennessee (not confined to the steam market) Exhibits 156A and 157A (1724a-1725a), show that the Tennessee market brought a better price in the years before 1950 than that in the United States as a whole. The Consolidation Coal Company witness, P. B. C. Smith, testified that the market here was good long before the Kingston Plant of TVA created a steam market (1324a).

b. The Development of the TVA Steam Plant System.

Exhibit 92 (1643a) shows the growth of the TVA steam plants. From 1953 to 1956 there was a tremendous increase in the number of units generating electricity by steam. The TVA witness, Hill, testified that the use of coal by TVA increased from 500,000 tons in 1950 to ap-

proximately 20,000,000 tons in 1956 (809a, 811a). In 1954 the TVA's purchase of coal amounted to 10,196,000 tons; in 1955 it was 14,377,000 tons and in 1956 it was 20,354,000 tons (811a). The Kingston plant, the nearest plant to Phillips, was started in 1954 and the last units were installed in the latter part of 1955 (799a, 1643a). Exhibit 115 (1662a) shows the tremendous increase in the steam market in Tennessee by reason of TVA's development of steam plants in the period of 1951 through 1957. This increase amounted to 40% (937a).

The great steam market that developed in the Tennessee Valley by reason of these plants of the TVA was free from competition of other fuels, such as gas and oil, since the TVA plants were designed for the use of coal only (1513a). The Government employee, Scollon, witness for the Union, testified that the competitive race between fuels for the market would not necessarily apply in Tennessee and that it was a state by state problem (1311a-1312a).

There was very limited production in Tennessee at the beginning of the growth of the TVA steam plant system to accommodate this great new market for coal (Exhibit 157A, 1725a). There was a substantial increase in Tennessee production from 1953 to 1956, but then the increase stopped, and a great decline ensued in the Tennessee production.

TVA is required to buy coal on bids (828a). The two main kinds of contracts for coal made by TVA are term and spot (806a). The spot market involves small orders of coal to be delivered in a short period of time, and this market offers definite advantages to small companies who desire to build up and develop a mine. According to the TVA witness, Hill, a small coal operator can feel his way along in the spot market without long term commitments or speculation (820a). At least seventy-five percent of TVA coal is bought on term contract and about twenty-

five percent on spot contracts. This policy has been in effect since the beginning of the steam plants (824a).

The Union witness, P. B. C. Smith, testified that the spot market allows a small coal company to open and experiment and develop a mine and then have a basis for longer range planning (1331a). He testified that the spot market provides an ample market for a small company—ideal for small companies commencing operations for the first time. He testified that small companies would risk considerable hazard on the term market, with respect to determining quality and availability of coal, and considering weaker financial resources. He testified that the spot market is vital to small companies in the Tennessee Valley and this is one of the reasons for its being conducted by TVA (1371a-1372a).

So it was that Phillips, a small company recently organized, was engaged in the spot market of TVA, but as any business people, they had hopes of some day developing into a stronger competitive position. However, the record does show that Phillips' partners were worried about investing any more money after they signed the contract with UMW, which held over the heads of these partners the threat of a lawsuit which finally did materialize with a claim that far exceeded their ability to make money (1466a).

c. Cooperation Between UMW and Major Coal Companies to Rid the TVA of Competition from Small Mines Through Walsh-Healey Minimum Wage Determinations.

After the TVA had gotten well along in its development of the steam plant system, in 1955, the United Mine Workers, Consolidation Coal Company and Pocahontas Fuel Company cooperated in obtaining a determination by the Secretary of Labor of a minimum wage in the coal industry under the Walsh-Healey Act (457a-460a). In pre-

senting this matter, the Union contended that the TVA was offending against the spirit of the Walsh-Healey Act and was buying coal at starvation prices, at intolerable and unjustified prices (459a-460a). The minimum wage determined in the bituminous industry by the Secretary of Labor was twice as high as the minimum wage determined in any other industry under the Walsh-Healey Act (1620a-1624a, which pages set forth Exhibit 41). The East Tennessee coal field is situated in the Southern No. 2 District which has as high a minimum wage as any of the major coal producing states and higher than the West Kentucky field where UMW has invested its money, and where mechanical mining can be used far more effectively.

At the 1956 Convention of the Union, Mr. Lewis introduced Secretary of Labor Mitchell. Mr. Lewis stated that Mr. Mitchell had been more cooperative with the United Mine Workers than any other Secretary of Labor (465a). Mr. Mitchell in his speech stated that he had worked together with the Union on many fronts and that he wanted to talk about some of these things. He said with respect to the determination of the minimum wage: "We purposely sought that determination in order to exclude from government bidding those non-union mines which are a detriment to the industry. And I think by and large we have succeeded, except for certain areas of government purchasing which still have to be, shall I say, investigated. Twenty-five percent, at the moment, of the TVA purchases are made under contracts less than \$10,000 which excepts such purchases from the determination of the Walsh-Healey Act. I have set in motion a study of the TVA purchasing policy to see if there is any evasion of the Walsh-Healey determination on the part of the TVA" (466a). He further stated: "I propose to continue this enforcement policy, because I believe it is in the interest, not only of the worker, but is in the interest of the fair

employer to prevent the chiseling, non-union employer from competing in the market place with fair employers who hire union labor" (466a-467a). Mr. Lewis responded to this talk by Mr. Mitchell by expressing appreciation for the speech and for the Secretary of Labor's attitude (467a).

After 1955, the United Mine Workers' contract amendments brought about two wage increases in the industry increasing the pay by \$4.00 per day or 50¢ per hour (471a). In 1958, the United Mine Workers, Consolidation Coal Company, Pittsburg-Midway Coal Company and Island Creek Coal Company cooperated together to obtain a re-determination of the minimum wage by the Secretary of Labor in the bituminous coal industry and succeeded in obtaining a 50¢ per hour increase in this minimum wage (470a-472a).

In view of the Walsh-Healey minimum wage, Phillips was never in a position to bid on the term market (857a). Their inability to survive as a coal operating unit on the spot market of TVA was because of the willful depression of that market as hereinafter shown.

d. Dumping of Coal and Other Methods Used by the Union and Major Coal Companies in Eliminating Phillips.

The record (858a-862a) shows the experience of Phillips on the TVA spot market. It graphically reveals the greatly improved conditions of the steam market heretofore described in the year 1956. Then toward the latter part of the year the price begins to decline and in 1957 and 1958 it hits the bottom and stays at a very low figure. Phillips was bidding very close to the market price of the TVA spot market (864a-866a, Exhibit 98, 1644a). I. E. Schmidt of the agency that sold Phillips' Coal testified that the cost per million BTU of the Phillips' bids were

kept within the high and low figures of the preceding awards of TVA (892a).

The monthly sheets of TVA spot coal awards are distributed to all producers and show full information about the size and cost of all bids submitted. Schmidt analyzed the great stack of TVA coal awards (which were exhibited at 788a-790a) and made certain charts from his analysis (863a). His chart, Exhibit 99 (1645a) shows the relationship of the BTU cost in the eastern plants of the TVA system against the cost in the system as a whole, and his Exhibit 100 (1646a) shows the tonnage in the eastern plants as compared with the tonnage in the western plants. These show that the western part of the system was dragging down the eastern part of the system. The TVA plant system is integrated. This means, according to the TVA witness Hill, that the system is considered as one whole in the development of the most economical power for the demand, and a more distant plant may be used to supply power to a customer located nearer to another plant (823a). The TVA witness Hochdorf testified that there is an electronic computing machine in Chattanooga that balances the factors of cost to determine the lowest generating cost from the various plants of the TVA System (835a-838a).

Schmidt's chart, Exhibit 101 (1647a-1651a) shows the large tonnage offered upon the spot market by Pittsburg-Midway and Peabody Coal Companies. The chart, Exhibit 102 (1652a-1655a), shows the large tonnage offered on the spot market by West Kentucky Coal Company and Nashville Coal Company. This witness analyzed the award sheets of the TVA to determine what companies were putting large tonnage on this market. A 10,000 ton bid is an extraordinarily large bid on the TVA spot market. The bids considered in the charts, Exhibits 101 and 102, pertaining to Pittsburg-Midway and Peabody and West Kentucky and Nashville, show prices based on cost

per million BTU (the only available figure of comparison), and deal only with these extraordinarily large bids. Schmidt did develop in his analysis of TVA spot awards that two other operating companies, Debardeleben and Truax-Traer offered coal on the TVA spot market on bids in excess of 10,000 tons but this chart, Exhibit 103 (1656a-1657a), shows that the prices on the bids of these two companies were not competitive, no awards were made, and that these companies did not repeatedly drop their price during the course of the making of these bids. The bid costs on Exhibit 103 might be contrasted with the bid costs on Exhibits 101 and 102.

Only one other operating company, Old Ben Coal Company, made several bids on the TVA spot market exceeding 10,000 tons, and this was only for a few times in 1958 (887a).

The chart, Exhibit 101, shows that Pittsburg-Midway and Peabody Coal Company made a large number of bids of 10,000 tons or over on the TVA spot market, and these show a gradual decline in the price bid by these companies on these large bids. Chart, Exhibit 102, of West Kentucky and Nashville Coal companies shows a great number of bids made at 10,000 tons, or over, many of them for as much as 60,000 tons, and these bids were made at low prices and were constantly dropped at intervals, quite a number of these bids being successful. These bids were made from the period of the middle part of 1956 to the middle part of 1958. This is the period of time that the spot market declined and that Phillips suffered a great decline in its price on the spot market as shown in Exhibit 97 (857a-862a).

UMW has prepared a chart in the back of its brief which incorrectly shows this dumping of coal was going on only a few months in late 1957. The clear record is to the contrary.

The Union witness, P. B. C. Smith, testified that the TVA spot market was subject to coal dumped upon that market that **temporarily** could not go elsewhere (1373a). This testimony would not mean that the market would ordinarily be subject to repeated offers of enormous tonnages such as were contained in the bids shown in Exhibits 101, and particularly 102, pertaining to West Kentucky and Nashville Coal companies.

Witness Smith also testified that the West Kentucky coal was sold extensively in the Midwest, up and down the Mississippi Valley and that that market of the West Kentucky coal has held up well and that the West Kentucky coal has been thrown into the TVA market rather than into the Middle Western market (1374a).

The West Kentucky annual statements show that that company has an impressive and diversified roster of customers in the Middle Western markets (590a). The West Kentucky Coal Company made no analysis of profit or loss on its sales to the Tennessee Valley Authority (596a). It was putting coal upon the TVA market without regard to the making of a profit. Peabody Coal Company, likewise, did not have an analysis of its profit or loss of coal for the TVA (733a). The president of Peabody Coal Company testified that he was afraid to look at some of the TVA sales (733a). The Peabody Coal Company, likewise, serves most of the Middle Western utilities (714a-716a).

While West Kentucky Coal Company was thus the big coal company that was dumping enormous bids on the TVA spot market at low and dropping prices, the Union, which was the majority investor in that company, as heretofore shown, was trying to induce the TVA to eliminate the spot market. In 1956 Mr. Lewis made a statement blasting the TVA for offering contracts of \$1,000 to \$10,000. He charged that the TVA was engaged in a conspiracy and was guilty of "contemptible double-dealing"

in making these small contracts for less than \$10,000, which would necessarily refer to the contracts on the TVA spot market (474a-475a). The Union sent Mr. Widman, assistant to the president of the International Union, to a meeting with the TVA directors, called at the instance of the president of the National Coal Association, at which the representatives of the major coal companies were present (781a, 829a). At this meeting, the major coal companies suggested that the spot market be reduced from 25% to 10% and that spot coal that was not shipped at the time specified in the contract be automatically cancelled (831a-833a). It will be remembered that the Secretary of Labor promised in his speech in 1956 to the United Mine Workers Convention that he was going to investigate the practice of the TVA of buying coal in amounts of less than \$10,000 (466a).

We believe the jury was entitled to conclude that it was more than coincidence, that it was the big Union-owned company, that was dumping the big tonnages on the TVA spot market at low and dropping prices when, at the same time, the Union was attempting to eliminate, or drastically reduce, that spot market. It will be remembered that the spot market was a market ideally designed for local small coal companies trying to develop and get started, and this was a reason for that market. We believe that the jury was entitled to the conclusion that the West Kentucky Coal Company and its subsidiary, Nashville Coal Company, were used as "fighting ships" on the TVA spot market to beat off and break the small local producers who were trying to get started on the market. These Union companies turned from profitable operations and suffered losses, and the Union backed them up financially during this period.

With respect to the effect that the West Kentucky Coal Company and Nashville Coal Company bids had upon the spot market, the TVA witness Hill testified that the bid

information sheets were distributed every month to all bidders on the TVA spot market (808a, 826a).

Mr. John L. Lewis stated that the utility market, and particularly the TVA market, was an evenly balanced thing, easy to upset (993a). The witness Amos, an expert in the coal business with long experience with the TVA market, testified with respect to Exhibit 102 (the spot bids made by West Kentucky Coal Company and Nashville Coal Company) that these bids would bear down heavily upon the price on the spot market (939a-940a).

The Vice-President of West Kentucky Coal Company, Hoffman, testified that the reason for the Uniontown Mine coal being put on the spot market in 1957 was because of the termination of the TVA term contract at the Colbert and Shawnee plants in September. But the Uniontown coal was scheduled to be shipped to the Tampa Electric Company under the contract which the West Kentucky Coal Company had assumed when it bought Nashville Coal Company. After reneging on that contract, West Kentucky Coal Company shipped 118,000 tons to Tampa on spot order from the Uniontown Mine in the summer of 1957 (1399a). It was after this (or about September) that the Uniontown coal in the largest amounts was offered on the spot market (1655a).

There is no explanation in the record with respect to the coal offered in large tonnage on the TVA spot market from the other mines of West Kentucky and Nashville Coal companies.

The record establishes that what actually occurred was that West Kentucky Coal Company, alone, had the facilities to ship coal to Tampa. In this position it sought to adjust the escalation clause in the old Tampa contract to raise the price there, and at the same time, it offered this large tonnage on the TVA spot market at low and

dropping prices over a period of seven months with an effect that was consistent with the Union purpose of knocking out the small coal producers supplying coal on the spot market of TVA. Hoffman testified that the production at the Uniontown Mine was decreased after the biddings of the Uniontown coal on the spot market of TVA, but this production continued for seven months in enormous quantities for sale at these low prices. The record shows that West Kentucky Coal Company had many other markets on which it could sell coal, and it has not had an opportunity to ship coal from the Uniontown Mine to Tampa under its agreement with Peabody Coal Company, because its coal has been needed elsewhere (730a).

In the meantime, on the TVA term market, the multi-million ton contracts being absorbed by Peabody Coal Company and West Kentucky Coal Company contained prices of \$2.90 per ton (Exhibit 106, 888a, Exhibit 80, 743a). These prices are to be contrasted with the Peabody contract with the Tampa Electric Company which has a price of \$3.70 per ton at the mine, even though the coal has to be shipped in a contest with rail coal thousands of miles down the river and across the Gulf of Mexico to Tampa (727a). Even the old Tampa contract on which West Kentucky reneged, seeking increases through change in the escalation clause, had a price of \$3.20 per ton at the mine, and this was low quality coal (1413a, 913a). It is apparent that these companies will sit on this important TVA market with these big contracts until all the local producers give up and move elsewhere for a market or quit. The Union's witness, P. B. C. Smith, testified that the TVA market is a depressed market (1369a).

The John Sevier Steam Plant in upper East Tennessee has very largely been taken over by the Pittston Company, shipping coal from its mines in the western part of

Virginia. Two-thirds of the coal requirements of that plant are supplied by the Pittston Company (1366a).

When development started on the Kingston Plant just west of Knoxville, Pocahontas Fuel Company (later merged into Consolidation Coal Company) acquired mines in nearby Anderson County (1350a), and the Pittston Company acquired the Meadow Creek mine at Monterey, Tennessee (696a). These are two of the five largest mines in Tennessee (955a-956a, 1363a-1364a). The large TVA contracts for the Kingston Plant have mostly been awarded to these two mines (833a-834a, 888a, 1361a-1362a).

Another mine that commenced shipping to the Kingston Plant is the Kentucky Oak mine in the Hazard field in eastern Kentucky. This involves the loan of the National Bank of Washington to North Fork Coal Company of \$1,500,000, secured by a pledge of the assets of the United Mine Workers to support the loan (502a-503a). The purpose of this loan was to purchase coal leases and operating units in the Hazard field, the land containing approximately 65,000,000 tons of mineable coal (650a-651a). Mr. Haley, president of North Fork, testified that this loan was used entirely to acquire leases (655a). He testified that Sturgill and Kelly are lessees on this property (655a). Sturgill and Kelly own and operate Kentucky Oak Mining Company (657a). This company leases from North Fork Coal Company and has other property (659a). The property contains a 10½ foot seam of coal in the Hazard No. 9 seam (663a). The company owns some of the largest augering equipment in the world, including a 7 foot auger (666a). Just before the 1959 term awards (five minutes before the opening of bids), a new freight rate from the Hazard field was announced. Consequently, Kentucky Oak Mining Company was awarded two large contracts for the Kingston Plant totalling 12,500 tons per week (1380a-1382a).

The Kingston market is saturated with these contracts with these companies. Yet, West Kentucky Coal Company is working on a reduced rail rate into this plant (607a).

The Widows Creek Plant of TVA, just southwest of Chattanooga, was long supplied by southern Tennessee mines. West Kentucky Coal Company obtained a rail rate reduction from its coal field to the Widows Creek Plant (607a, 1459a-1460a). West Kentucky Coal Company has begun to bid on the business of this plant (607a). The West Kentucky Coal Company coal is now competitive at the Widows Creek Plant, although the coal from the upper East Tennessee field where Phillips is situated, cannot move to that plant because of freight rates (1367a).

The Kingston and John Sevier plants are the eastern plants of TVA, and the Widows Creek plant is the eastern-most plant of TVA's western plants (Exhibit 145, 1713a).

The western plants of TVA have been saturated with coal from the west Kentucky coal field. In the last awards of TVA West Kentucky Coal Company was awarded 10,010,000 tons over a term of years, out of the total term award of 16,563,880 tons (886a, 888a). In September, 1959, Peabody Coal Company was awarded a 5,200,000 ton contract for the western plants (1273a). In 1959, West Kentucky Coal Company was awarded a contract for 850,000 tons per year for a period of fifteen years (1459a).

West Kentucky Coal Company has an assured base for many years of heavy tonnage to TVA under existing contracts (1459a). It has an advantageous freight rate now into Widows Creek Plant and is negotiating a reduced freight rate into the Kingston Plant.

In addition to other TVA contracts, Peabody Coal Company has virtually obtained possession of the newest TVA steam plant and one of the largest ones (1274a). This

contract calls for 65,000,000 tons of coal (744a-745a) which is by far the largest contract ever let by TVA.

Mr. Lewis stated that adjacent utility markets were influenced by the depressed TVA market. The witness Amos agreed with this statement (993a). He further testified that the depreciated TVA market would have an effect on the Carolina and Georgia utility markets which might have been open to Phillips (993a). An example is Duke Power Company which in 1958, switched from a policy of buying coal partly on term contract and partly on spot order to buying all of its coal on spot order (779a). In the latter part of 1958, Phillips, just before the partnership went out of business, shipped coal to Duke Power Company on spot contract, but could get no better price than \$3.30 net to it, which, although better than the TVA price at the time, was still insufficient to be profitable (862a).

II. There Was Ample Evidence to Support the Amount of Damages Awarded by the Jury.

The jury awarded a verdict of \$90,000 for Phillips against UMW.

Exhibit 22 (1592a) shows the tons of coal shipped on the steam market by Phillips in the years 1956 through 1958, and also shows the average price that Phillips received for the steam coal. These average prices were: \$3.92 in 1956, \$3.20 in 1957, and \$3.13 in 1958. Exhibit 117 (1663a) shows the national average price of coal and what amount Phillips would have received in each of these three years, if it had received the national average amount on its tonnage. This aggregate amount was approximately \$94,000 more than the Company actually received.

**A. What a Fair Price Would Have Been for Steam Coal
Were It Not for the Tampering With the Market
by the Conspirators Comparative Prices.**

The Union has advanced in the lower courts various arguments with respect to both the price of Phillips in 1956 for steam coal and the lower prices in 1957 and 1958. With respect to the price in 1956, the Union attempts to explain the fact that this was a much higher price than in the later years. The witness Smith, for the Union, testified that an emergency condition arose in 1956 by reason of a drought which decreased the hydroelectric power, thereby increasing the steam requirement of the TVA system, while at the same time testifying that the rainy weather in that period caused strip coal mines to cease production (1326a) causing a shortage of supply. This testimony is inconsistent. This witness overlooked completely, until cross-examination, the fact that the Kingston Plant was not in full use until early 1956, when the market and the demand materialized, and this must have had considerable influence on the price in 1956 (1370a-1371a). Prices for a market cannot be said to be abnormally high when they are the prices in existence at the time the market materializes. Moreover, steam prices in the area were over \$4.00 (greater than Phillips' 1956 price) before the Kingston market materialized (895a-994a).

It is to be observed that the great drop in price in 1957 of Phillips' coal was in the same year that the witness Seillon stated was the peak year in the export trade of the coal producers of this country, the export being 76,000,000 tons (1295a). The years 1956 and 1957 were two of the coal industry's good years, and the national price rose in each of those years (1724a).

We have considered, above, the development of the TVA plants bringing the steam market in Tennessee to one of the six largest steam markets of the country from

an insignificant position (1662a). This occurred in just a short period of six years. By 1956 TVA was the largest bituminous coal purchaser in the country (800a). Exhibit 115 (1662a) gives economic facts which would indicate that the Phillips' average prices for steam coal in 1956, 1957 and 1958, were far lower than they should have been. Tennessee's growth in steam utility use of coal was 450% in a period of six years. The State of Virginia's growth in the same period amounted to only 33½%. Virginia is far ahead of Tennessee in coal production, yet the cost of steam coal at the Virginia plants was \$8.75 and in Tennessee it was \$4.91. Tennessee was the lowest producer of coal of any of the six top users of steam coal (except New York), and yet, the Tennessee cost of steam coal was lower than any of those other states.

The witness Amos, who is probably more experienced in the coal markets than any other individual in this state, testified that the reason for this low price of steam coal in Tennessee was because of pressure from outside driving that price down (942a). In his opinion, the Tennessee price should have been **at least** equal to the national average price of coal in the United States (942a-943a). That there was an artificial condition depressing the TVA spot market price in late 1956 cannot be doubted, because at the same time that this was going on in this great new TVA market, Consolidation Coal Company and the other major producers of coal in the other parts of the country were raising the price of coal 40¢ per ton (549a).

Even a comparison of term prices at TVA Kingston plant with spot prices at the same plant shows a downward pressure was on the spot price.

The Union's witness, Smith, testified that he bid the 1956 \$4.00 term price to TVA at Kingston, for Consolidation Coal Company on the lowest possible figure under

which he could come out with any kind of profit (1336a). This price was \$4.00 in 1956 and remained at \$4.05 in 1959 (1362a). The price did not go down in the term market of TVA at Kingston, and this price is to be compared with the great drop, from \$3.92 which Phillips realized in 1956 on the Kingston spot market, to \$3.20 in 1957, and \$3.13 in 1958 on the Kingston spot market. The same witness, Smith, testified that the TVA term price was depressed (1369a), and he testified that Consolidation Coal Company makes its substantial profits at other mines in other parts of the country, Ohio, Pennsylvania and West Virginia (1370a).

The East-South Central region has a cost of steam coal of \$4.61. This is the TVA region, including Alabama, Tennessee and Kentucky (1375a). The East-North Central region, including the Middle Western states with a considerably larger production of coal contained in those States, has a cost of \$6.00 for steam coal (1376a). The figures for TVA, alone, with respect to cost of coal were \$4.49 in 1958 and \$4.54 in 1957 (1512a).

B. The Quality of Coal Governs Its Price.

Normally, the quality of a carload of coal is as important as the quantity on the price that the coal can command (891a, 943a). The Phillips Brothers Coal Company coal averaged 13,215 BTU's per pound (1515a). The witness, Amos, testified that Campbell County coal had an average BTU of 13,200, and the UMW witness, Scollon, testified that the average Tennessee BTU is 13,460. Mr. Scollon also testified that the average United States high volatile coal had an average BTU of 12,900 (1284a). The average, given above, for Phillips Brothers was for its steam coal on bids to TVA (1515a). The Peabody Coal Company witness Jewell testified that the East Tennessee coal was a higher quality coal than Peabody coal (1272a).

The Union has contended, (1) that steam coal should have a lesser value than other coals on the market, and (2) that strip coal should have a lesser value than deep mine coal. It is our contention that the quality of the coal is what counts. Witness Scollon produced charts showing a greatly increased steam use of coal in the country, whereas, in the same period of time, the price of coal has gone up rather than down. 11% of the coal production in 1940 was used in the steam-electric market and in 1958 the percentage was 42% (1291a). In the same period average coal prices rose from \$1.91 to \$4.86 (1724a). Some of the major coal companies live on the steam market. For instance, 80% of the Peabody coal goes to the steam market (1267a). Actually, the steam market includes the major uses of coal, including utility, industrial and railroad (1292a). The so-called premium metallurgical coal is not sold, particularly on the open market, but comes from captive coal mines and has no bearing on the quoted national average price of coal (1293a-1294a).

The steam market uses all grades of coal, from the highest quality to the lowest quality. It is our contention that the quality of the coal is what counts, regardless of the fact that it is steam coal. A consumer buys the heat value in the coal rather than buying just a ton of coal. This is illustrated by the Peabody Coal Company witness, Jewell, who stated: "You get down to your lowest, most difficult grades of steam coal to sell, which we call carbon, which is one-quarter inch by twenty-eight mesh, carrying very low price now. Something like \$2.80 per ton" (1267a). This price is to be compared to the Peabody Coal Company price of \$3.70 which Peabody gets for its regular steam coal to Tampa, although it has to ship that coal thousands of miles and is in a competitive race with rail coal in that market, the \$3.70 being the price at the mine (727a).

Witness Smith testified that all coal, strip or underground, is bought on the utility markets on the basis of

quality—"the heat unit in the coal" (1350a). The TVA based its coal awards on the BTU, or the heat unit, in the coal, which is determined by the bidder's guarantee of quality (792a). This quality determines the cost of the heat from the coal and determines whether a bid price will be accepted.

The acceptance of coal on the market is not governed by the nature of the mine from which it comes, but by its quality and bid price. Determining the winner among competitive bids is a matter of arithmetic, with quality and price being the two essential factors.

A considerable amount of strip coal is put upon the market, together with a great deal of debris which is loaded with the coal when the loading shovel picks it up (1347a). Of course, this would affect the quality of the coal, but when the Phillips coal had an average BTU of 13,215, this circumstance has no bearing upon the issue. The BTU of Phillips coal indicates that its smaller shovels can pick up the coal more carefully and that Phillips was maintaining its coal in cleaner condition. If this were not so, it could certainly not have carried the high BTU that it did carry. Furthermore, two-thirds of the strip coal of the country comes from the stripping mines of the Central-Western basin (1350a-1351a). The East Tennessee coal is a higher quality of coal than the coal in the Central-Western basin (1354a-1355a). The steam coal in the Illinois utilities markets averages 10,971 BTU, and this coal comes from the Central-Western basin of Illinois, Indiana and West Kentucky (1355a). Indiana utility coal, likewise, comes from the Central-Western basin and it has an average BTU of 11,247 (1357a). With two-thirds of the strip coal of the country coming from this quality of coal the price of that coal could hardly be applied to the Phillips coal which average 13,215 BTU. It does not make any difference to the consumer whether the coal comes from a stripping machine or an underground mine, if the quality of the coal is the same (1357a).

The national average of all coal in the United States, according to Exhibit 156A (Bureau of Mines, 1958), was, for 1956—\$4.82, for 1957—\$5.08, for 1958—\$4.86 (1724a). Only a small part of the coal contained in this average price would be sold on the open market as premium metallurgical coal (949a, 1293a-1294a). This average price includes lignite, a very low quality of coal, and sub-bituminous coal which is coal which is only partly formed (951a). This price includes all of the strip coal from the Central-Western basin, which carried a very low BTU, and it includes all the coal that was picked up with a lot of debris by stripping shovels as testified to by the witness P. B. C. Smith. It includes all the carbon which was mentioned by the witness Jewell, which carried a very low price. All these coals bore down on this national average price. It is to be borne in mind the circumstance that the steam market is far and away the biggest market represented in this average price and includes the utility, industrial and railroad uses (1292a). There is also to be borne in mind the fact that the higher priced domestic or retail delivery coal has fallen to a negligible part of the market for the country as a whole (1291a).

As a matter of fact, the UMW, in its publication United Mine Workers Journal, has taken the position that the TVA was not justified in paying less for its steam coal than the national average price for coal in the country. In the UMW Journal for July 15, 1954, page 13, Exhibit 124 (990a-992a), the United Mine Workers stated that the TVA was buying coal at starvation prices in the coal contracts awarded to a number of East Tennessee and East Kentucky coal companies which were listed. The prices at the mine were given, the cost of transportation to the Kingston Plant was given, and the total cost at the plant was given. This article stated that most of the established operators of the country were getting a price for coal equal to the entire cost of these awards at the

plant, including the price at the mine, plus transportation (992a). This was steam coal. The average of these contracts, considering the cost at the plant as suggested by this article, comes out to an average price higher (991a) than the 1954 average (1724a) for all coal sold in the United States. We believe that the jury was entitled to consider this position taken by the United Mine Workers in 1954, in determining the merits of the Union's contention in this case as to the applicability of the national average price for all coal as a proper figure to use in determining a fair price for Phillips' steam coal.

C. Computation of Damages.

Exhibit 22 (1592a) heretofore discussed, and Exhibit 117 (1663a), show the computation of damages based upon the national average price of coal, as compared with Phillips' average price for steam coal. This shows a total damage of \$94,000 without consideration of the Welfare Fund money paid in by Phillips. The witness, Ambs, testified that the national average price should have been exceeded by the Phillips Brothers' coal (942a-943a).

The approximate fairness of the above figure of \$94,000, as damage resulting from TVA spot market activities of the co-conspirators in 1956-1958, may be demonstrated by a computation based upon Phillips' earlier profit-making ability. In 1955, Phillips made a profit of \$28,542.19. Extending this same profit figure into 1956, 1957 and 1958 would produce a profit for the three partners for three years of \$85,626. Actually, the company suffered a net loss for the three years of \$12,727. The difference amounts to approximately \$98,000.

APPENDIX II.

FACTS AS TO THE CONDUCT OF UMW TOWARD THE UMW WELFARE FUND TRUSTEES.

A. The Attitude of Mr. John L. Lewis, Chairman of the Board of Trustees, With Respect to the UMW's Control Over the Welfare Fund.

Mr. Lewis was asked in his deposition given in this case if he did not realize in the period of 1947 up until the contract of 1952 that the running of the Welfare Fund by the Union, itself, would be illegal, and his answer was "No." He was then asked:

"Was it your concept all the way through that the Welfare Fund could properly be operated by the Union?

A. 'Certainly' " (277a).

Mr. Lewis later said that it was merely a matter of negotiation so far as he was concerned (277a-278a). This was the first time in this case that Mr. Lewis was confronted with the question of control of the Fund by UMW, and his response on this occasion was therefore entitled to persuasive weight so far as the jury was concerned and could be weighed more heavily than later efforts of the UMW and the Trustees during the trial of this case to picture Mr. Lewis as a passive Trustee, merely taking advice from Miss Roche, the so-called neutral Trustee, so far as the management of the Welfare Fund was concerned (1060a-1061a).

B. The Plan Established by the UMW Prior to 1950 to Maintain Control of the Welfare Fund.

Before 1950 the UMW had openly set up a plan to keep control of the Welfare Fund. This was shown by the following evidence:

1. Before 1950 the benefits of the Fund were paid exclusively to UMW members and the resolution requiring UMW membership was printed in full and widely disseminated to the men throughout the industry (339a-342a, Exh. 33).

2. A system was devised to keep non-regular members from participating in the Welfare Fund benefits, using two methods:

a. In the 1948 UMW Convention the initiation dues were increased. The reason for this was to bar the part-time miners who would come into the industry for seasonal occupation and who would draw benefits from the Welfare Fund (283a-286a).

b. An International Membership Committee was established in 1948 (289a-290a). The establishment of this was part of the procedure set up whereby the Welfare Fund applications were processed through the UMW organization and into the hands of the Welfare Fund for the purpose of preserving the status of membership which carried with it valuable rights (372a-375a).

3. Pensioners under the Welfare Fund were required to maintain their UMW membership. This was accomplished by amending the UMW Constitution in 1948 to require the retired miners under pensions to maintain their membership and pay dues to the UMW (287a-289a).

4. Local and District officers of the UMW processed the Welfare Fund Forms, including the applications for benefits (286a-287a).

C. The UMW Sought to Name and Control the Trustees of the Welfare Fund in the National Bituminous Coal Wage Negotiations in 1950.

1. Fights Between Mr. Lewis and Mr. Ezra Van Horn and Between Mr. Lewis and Senator Styles Bridges Prior to 1950.

Even though the UMW controlled the Welfare Fund prior to 1950 by the above-named devices, Mr. Lewis had a long and bitter fight with respect to how the Fund should be managed with Mr. Ezra Van Horn, the Operators' Trustee under the 1948 National Bituminous Coal Wage Agreement (268a-270a, 281a-282a, 536a) and also disputes from time to time with Senator Styles Bridges, who was named to the Board of Trustees in 1948 as the neutral Trustee (298a, 300a).

2. Fight Between Mr. Lewis and Judge Charles I. Dawson in the Years 1949 and 1950.

In September 1949, Mr. Van Horn resigned as the Operators' Trustee. Mr. Lewis admitted this (295a) and confirmed the exchange of telegrams between Mr. Van Horn and himself, which telegrams were exhibits to the deposition of Judge Charles I. Dawson (296a, 524-525a). Upon the resignation of Mr. Van Horn the operators representing 51% of the tonnage of coal in the industry, as required by the 1948 National Bituminous Coal Wage Agreement, named Judge Charles I. Dawson as the Operators' Trustee. Mr. Lewis admitted this fact (294a, 296a). Mr. Lewis, as Chairman of the Trustees, refused to recognize Judge Charles I. Dawson as a Trustee (297a, 522a-523a, 1082a). The telegrams exhibited by Judge Dawson to his deposition and confirmed by Mr. Lewis as being the telegrams exchanged between Mr. Van Horn and himself (524a-525a) showed that Mr. Van Horn had resigned; that he had notified Judge Dawson of the latter's appointment

and had notified Judge Dawson of the meeting already scheduled for November 21, 1949 (525a). Mr. Lewis also testified that Judge Dawson attended two meetings of the Board of Trustees and that he assumed there were minutes of those meetings. Counsel for Phillips Brothers requested that these minutes be produced but none were forthcoming (297a-298a).

In an attempt to refute Judge Dawson's deposition and to explain the failure of the Trustees to produce minutes of the two meetings of the Trustees that Judge Dawson attended, Mr. Lewis endeavored in later testimony to say that Judge Dawson was merely given an opportunity to talk with respect to the question of seating him as a Trustee. However, almost in the same breath Mr. Lewis indicated that Fund business was transacted at these meetings (1121a-1122a).

Also endeavoring to explain the absence of the minutes of the two meetings, Mr. Val Mitch, General Counsel for the Trustees, testified that Judge Dawson had asked for the meetings; that Mr. Lewis had not called the meetings; and that no business was discussed except the seating of Judge Dawson and that this was the reason why there were no minutes of these meetings (1088a). Mr. Mitch's testimony was likewise conflicting on the question of whether Fund business was discussed (1081a-1082a).

The telegrams between Mr. Lewis and Mr. Van Horn show that the meeting of November 21, 1949, the first of the two meetings attended by Judge Dawson, had already been scheduled by Mr. Lewis as a regular meeting of the Board of Trustees (524a-525a).

Judge Dawson testified in his deposition that he was appointed by the operators as Trustee after Mr. Van Horn's resignation. Judge Dawson stated that Mr. Harry Moses, who was acting for the operators in the contract negotiations then taking place with the UMW, called him

and told him that the operators wanted him to serve. Judge Dawson informed him that he wanted to have three questions cleared up before he accepted the appointment. He met with Mr. Moses, Mr. Amos and Mr. George Love, the last two representing Consolidation Coal Company (520a). These questions were ironed out (1004a), and he accepted the appointment on November 5, 1949 (519a).

Judge Dav on attended the first meeting of the Board of Trustees on November 21, 1949 (521a), the regular meeting of the Trustees of which he had been notified by Mr. Van Horn. He testified that at this meeting Mr. Lewis instructed the Secretary of the meeting, Mr. Mitch, not to recognize anything that Judge Dawson said and not to take down any motions which he made or votes which he cast (522a). Mr. Lewis refused to recognize Judge Dawson at the second meeting which was held December 2, 1949 (523a). Mr. Lewis was contending that Mr. Van Horn had submitted a qualified resignation as Trustee and that, even though Judge Dawson had been certified by the operators representing 51% of the tonnage in the industry, the Trustees had the right to pass on a new Trustee (299a-300a, 1121a). Mr. George Love, however, confirmed in his testimony that Mr. Van Horn resigned September 14, 1949 (539a). Judge Dawson testified that he consulted with Mr. Love and Mr. Moses about the treatment which he was receiving at the hands of Mr. Lewis and that they insisted that he take action in the courts (525a). In accordance with their wishes a lawsuit was commenced (525a). Judge Dawson testified that the next occurrence was the signing of the 1950 National Bituminous Coal Wage Agreement on March 5, 1950. This contract, finally negotiated with Mr. Lewis by Mr. Love, named Mr. Charles Owen as the operators' Trustee of the Fund instead of Judge Dawson without any prior notice to Judge Dawson that this was going to be done

(525a-526a). Judge Dawson had previously notified Mr. Moses and Mr. Love of the pending lawsuit, but he testified that because they had been so treacherous toward him he felt no reason to continue the lawsuit after the 1950 contract was signed (526a-527a).

Judge Dawson testified that he did not intend to accept any compensation from the Welfare Fund for service as the Operators' Trustee, but rather, he intended that his compensation come from the Operators (529a) just as Mr. Lewis' compensation as the UMW Trustee has always come from the UMW (1120a). However, during the entire period that Mr. Owen served as the Operators' Trustee (From March 5, 1950, until his death on July 20, 1957) his compensation was paid by the Welfare Fund itself. His salary was \$35,000.00 per year (1053a), an amount which Mr. Schmidt, his successor trustee, testified was an exorbitant and unreasonable amount for merely attending four or five meetings each year (1053a-1054a, 1062a).

The Trial Court, in setting aside the jury verdict as to the Trustees, made no reference to Judge Dawson's testimony. However, the jury was entitled to put full faith and credit upon the testimony of this former United States District Judge and was fully justified in concluding that Mr. Lewis' actions were motivated by the purpose of preventing a strong man like Judge Dawson, who would not tolerate the continued UMW control of the Welfare Fund, from being seated as Trustee and causing the operators to appoint a stooge as their Trustee who would cooperate with Mr. Lewis in allowing the UMW to continue in control of the Fund.

3. The Naming of the Operators' Trustee and the Neutral Trustee Was an Issue in the Negotiations of the National Bituminous Coal Wage Agreement of 1950.

In this regard, the jury had the benefit of additional evidence from statements and testimony of Mr. George

Love. During the 1949-50 negotiations, which culminated in the 1950 contract, Mr. Love, chief negotiator for the operators stated publicly that the UMW was attempting to name stooges of its own choice on the Board of Trustees as operators' Trustee and as neutral Trustee (292a, 541a). In his deposition in the present case Mr. Love admitted that the identity of the Trustees on the Welfare Fund was an issue in the 1949-50 negotiations (541a), even though this was not a proper issue for negotiation under the National Labor Relations Act, as amended, which Act (29 U. S. C. A. Section 186c) strictly requires that the employers name a Trustee, that the Union name a Trustee, and that these two Trustees select a neutral Trustee. Moreover, on March 5, 1950, a few minutes after the 1950 contract was signed, Mr. Love, in the presence of Mr. Lewis, stated the following with respect to the Welfare Fund: "The responsibility is clearly on the shoulders of the Union, and if it fails, the public and ourselves will look directly at the Union" (347a, 547a-548a).

In the light of this evidence the jury was completely justified in finding that, in the conspiratorial agreement entered into in 1950, between the UMW and the large coal operators the *quid pro quo* for the UMW's acceptance of the large Operators' plan for stabilizing prices in the industry was the agreement by the large operators that the Welfare Fund would remain in the control of the UMW as it had been from its inception in 1946.

4. Mr. Lewis Was Successful in 1950 in Obtaining Two Trustees Who Would Cooperate in the UMW's Continued Control Over the Welfare Fund.

The negotiators of the 1950 contract also named in the contract, itself, Miss Josephine Roche to be the neutral Trustee of the Welfare Fund, replacing Senator Bridges, even though both the contract and Section 302 of the

Labor Management Relations Act of 1947 (29 USCA., Sec. 186) required that the neutral Trustee be selected by the Union Trustee and the Operators' Trustee rather than by the negotiators of the contract. In an affidavit filed in the early stages of this case Miss Roche stated that prior to her appointment as Trustee she had no previous connection with the UMW (348a-349a). As the case developed, however, the UMW admitted that in 1946 the UMW purchased 222,000 shares of stock in the Rocky Mountain Fuel Company of which Miss Roche was president and chief owner (674a). Miss Roche testified that her father was president of the company before her and that the company was in financial difficulties (1011a-1012a). In 1947, one year after the UMW's unsuccessful attempt to bail Miss Roche's company out of its financial difficulties, Mr. Lewis employed Miss Roche as his personal special assistant in his position as Trustee of the Welfare Fund (351a). In 1949, Miss Roche was made director of the Fund at a time when it was operated exclusively for UMW members, a position which Miss Roche has continued to hold to the present time in conjunction with her position as the so-called neutral Trustee (350a).

There was, therefore, ample evidence to support the jury's conclusion that Miss Roche and Mr. Owen were the two stooges that Mr. Love had stated in 1950 that Mr. Lewis was attempting to put on the Board along with Mr. Lewis, himself.

The practical insignificance of the position of Operators' Trustee since 1950 was plainly shown in the testimony of Trustee Henry G. Schmidt, wherein it was shown that, upon Mr. Owen's death in July, 1957, a successor Trustee was not appointed until May, 1958, a period of some ten months, during which time the Fund collected and expended approximately \$100,000,000; that the larger operators exhibited no particular interest in being repre-

sented on the Fund that was handling such huge sums of money, and Mr. Schmidt finally was forced to accept the position himself (1054a, 1061a, 1063a).

D. The Conduct of the Welfare Fund Since 1950 Has Been Consistent With the Policy of the UMW to Control the Welfare Fund as an Instrument of the Conspiracy to Restrain the Trade of Small Coal Companies.

The record in this case contains abundant proof to support the jury's verdict that the means adopted by the UMW to control the Welfare Fund prior to 1950, as set out hereinabove, have been continued since 1950 and that such means have been a prime instrument to carry out the conspiracy to restrain the trade of small coal companies entered into between UMW and the large coal companies of the country.

1. All Means Adopted by the UMW Prior to 1950 to Insure UMW Membership as a Prerequisite for Obtaining Welfare Fund Benefits Have Continued Since 1950.

The continued requirement since 1950 of UMW membership as a prerequisite for obtaining Welfare Fund benefits is shown by the following evidence:

a. Statements made since 1950 by the Chairman of the Board of Trustees and by the General Counsel for the Trustees show that the Trustees have continued to interpret the contract as requiring UMW membership for obtaining Fund benefits. In October, 1952, two and one-half years after the UMW claims the Welfare Fund was granted its independence, Mr. Lewis, Chairman of the Board of Trustees made the following statement at the 1952 UMW Convention:

“Based upon present computations governing the life expectancy of individual members, \$18,000.00

will be paid on the average under each pension award. Certainly we cannot continue to pay out that \$18,000.00 over a long period of years without fully protecting the legal membership of that individual and causing him to maintain his constitutional membership in this organization."

In his deposition Mr. Lewis was asked about this statement. His answer was: "Those statements were predicated upon the conditions existing at that time and are not necessarily the law and the prophets in 1961."

Mr. Lewis was then asked: "But this was 1952, after the signing of the 1950 contract?" Mr. Lewis replied: "Exactly so, exactly so. But that whole question has been clarified since that time" (379a).

There was no effort made by the Trustees to show that this question was clarified at some time subsequent to 1952. On the contrary, the Trustees stubbornly insisted that the question had been clarified on March 5, 1950, when they say the Fund was liberated from the UMW (340a-343a, 1026a, 1119a). However, this insistence on the part of the Trustees should be compared with Exhibits 35 and 36, portions of which were read into the record in this case (363a-365a). Exhibit 35 is an article appearing in the *United Mine Workers Journal*, dated May 15, 1960, reporting a meeting of UMW District officers at the Welfare Fund office in Washington, D. C., where Miss Josephine Roche, Trustee and Director of the Welfare Fund, explained how to process the application for pension forms of the Welfare Fund (363a-364a). Particular attention should be directed to Exhibit 36, which is an article appearing at pages 3 and 4 in the *United Mine Workers Journal*, dated July 1, 1950, reporting the fact that Miss Josephine Roche had mailed to UMW District Officers new forms for obtaining hospitalization benefits from the Welfare Fund, together with instruc-

tions on how these forms were to be processed. This information mailed by Miss Roche states that these hospitalization benefits are available to members of the UMW and that in the event that a miner no longer is a member of the UMW in good standing he must turn his hospitalization authorization card (Form 85-HS) in to his local union (365a-366a). This action on the part of Miss Roche was taken four months after March 5, 1950, the date on which the Trustees now claim that the Welfare Fund was granted its independence from the UMW.

Mr. Val Mitch, General Counsel for the Fund, who furnished the legal advice to the Trustees, testified in a case in the United States District Court for the District of Columbia as late as 1956 that he construed the contract as follows: "I read it that 'all of the foregoing benefits are to be made available to members of the Mine Workers who are employees of the operators' signatory,' I don't think it could be any other way, in my opinion" (345a, 1083a).

Mr. Thomas A. Kennedy, Vice President of the UMW during the period covered by this case and currently President of that organization, referred to the Welfare Fund in a speech to the 1956 UMW Convention as being the "Welfare Department of the United Mine Workers of America." Mr. Lewis characterized this as a slip-of-the-tongue (382a).

b. The International Membership Committee established in 1948 for processing Welfare Fund applications (372a-373a) continued to function after 1950 and Mr. Lewis testified that the Committee continues to function at the present time (374a-376a). Vice President Kennedy pointed out in 1952 that the work of this Committee was important in maintaining the integrity of the UMW membership which had "become very valuable" (375a). Mr. Lewis had estimated the average value of membership

under Welfare Fund pension benefits alone at \$18,000 per man (379a);

c. Pensioners under the Welfare Fund were required to retain their membership in the UMW and pay UMW dues after 1950. Mr. Lewis had made an address to the UMW Convention in 1948 stating that the requirement that the pensioners pay dues to the UMW was because of the "numerous statutory provisions and the punitive provisions of the Taft-Hartley Act, whether a man who pays nothing in the form of dues for an extended period of time to the organization could maintain a legal relationship and be adjudged a legal member" (288a). This question of dues of retired pensioners under the Welfare Fund was raised at the 1952 UMW Convention by some of the delegates (377a-380a), and Vice President Kennedy explained that the dues were necessary "in order to legalize beyond any question of doubt the membership of these individuals" (378a).

The question was never clarified in the record as to the origin of this erroneous interpretation of the law that the Taft-Hartley Act requires pensioners under a Welfare Fund to retain their Union membership.

This theory was not advanced by opposing counsel in this case. Rather they contended there was a complete change of policy in 1950 about the requirement of union membership under the Welfare Fund when the Courts had passed on that question (344a).

Nevertheless, these statements by the UMW officers about the requirement of retaining union membership made quite an impression upon the UMW membership, as shown by the statement of delegate Morris at the 1952 UMW Convention, where he stated:

"It would not be healthy for our delegation not to get up and speak on this issue at this Convention.

When it came time for resolutions to be drawn to be sent to our International Secretary-Treasurer, the old men asked the Resolutions Committee to cut the dues. We told them and quoted from the proceedings of our last Constitutional Convention to the effect that our great leader, John L. Lewis, settled a big argument that it was only due to the punitive measures of the Taft-Hartley Act that we had to charge something and the dollar was the least we could charge" (380a).

The question was again raised by some of the delegates at the 1956 UMW Convention and this same representation was repeated to the membership by Mr. Lewis that there was a legal requirement that the pensioners retain their Union membership (381a).

d. The report of the UMW officers to the 1952 UMW Convention contained the following statement under the heading "UMWA Welfare and Retirement Fund":

"Determination of the eligibility of an applicant is the sole responsibility and function of the Fund, with the one exception of certification of Union membership which is strictly the province of the Union" (359a).

Mr. Lewis attempted to explain this statement by testifying, in substance, that the integrity of applications was judged by the Welfare Fund upon the basis of certification of the Union membership by the Union officers (360a-361a).

e. The Welfare Fund application for benefits forms continue to contain spaces for certification of membership in good standing in the UMW. These Welfare Fund forms are set forth in the record at 357a-359a, introduced as Exhibit 34 (357a). There are numerous spaces on these forms for certification by UMW Local, District and In-

ternational officers of membership in good standing and spaces for the seals of the respective UMW organizations. If an applicant writes directly to the Fund he is sent a form asking for his Local Union number (1087a).

f. Hospitalization benefits are paid only to employees of signatory operators who are members in good standing of the UMW. This fact is apparent from the Welfare Fund form entitled "Request for Changes on Form 85-HS" which deals with the hospital card given to beneficiaries by the Welfare Fund, which card authorizes its holder to receive hospitalization benefits from the Fund. This form is part of Exhibit 34 (1606a) and is referred to at 359a. This form requires a change on the card or a surrender of the card for any one of the following situations: (1) the member has died; (2) the member has married or remarried; (3) *the miner is no longer a member of the United Mine Workers of America*. If a miner is no longer a member in good standing of the UMW he must return the hospital card to the Local Union (366a).

g. The Trustees have maintained the Resolutions of the Board of Trustees in secrecy since 1950. Before 1950 the Resolutions of the Board of Trustees, which formally required UMW membership to participate in benefits of the Fund, were reported and quoted verbatim in such publications as the *United Mine Workers Journal* (339a-342a).

Since 1950 there has been no publication of the Resolutions in the *United Mine Workers Journal* (342a-344a). Even in his testimony in this case, Mr. Mitch did not introduce a copy of the Resolutions of the Trustees, but rather, he submitted as Exhibit 141 a "List of requirements for eligibility for benefits" (1074a). Resolutions of the Trustees are not available to the public and are not even available to applicants who write to the Fund (1086a). The Trustees will not show the Resolutions to anyone (1986a). The last time the men in the industry

Were given an opportunity to see for themselves the eligibility requirements of the Fund was before 1950, when UMW membership was admittedly a requirement for receiving Fund benefits.

h. Statements in the annual reports of the Trustees contained illusory language with respect to UMW membership. The Trustees put great store in this case upon certain language contained in the elaborate annual reports prepared each year by the Welfare Fund and it was upon these reports that the Trial Court based its opinion that it is reasonably clear that UMW membership was not a requirement for obtaining Fund benefits. The language contained in these reports is found at 1030a-1031a. The language quoted at page 1030a is:

“No benefit is authorized *solely* on the basis of Union membership.” (Italics added.)

It is apparent from this language that membership is a requirement, but is not the *only* requirement. The language relied upon by the Trustees at 1031a is:

“Trust Fund benefits are not authorized on the basis of Union membership, but only in conformity with Trustee regulations.”

It is again apparent that UMW membership will not *alone* obtain the benefits but that there are more restrictive requirements than simply membership. This was the only evidence that the Trustees introduced to show that they had cleared up any misunderstanding among the employees in the industry about this subject. Moreover, these annual reports are not distributed to the employees in the industry (1029a).

i. There is a broad general understanding among the men in the industry that UMW membership is a requirement to obtain Fund benefits. Mr. Mitch, General Counsel for the Fund, testified that suits were being filed

against the Fund wherein claims were being based solely upon UMW membership (1079a). On cross-examination he testified that there were many of these suits being brought all over the nation (1090a). This is a clear indication of a broadly held view by the employees in the industry that membership is the basis upon which benefits are paid. Phillips Brothers' employees were under the impression that they were required to join the UMW in order to receive hospital cards (969a, 979a). Phillips Brothers' employees did not *in fact* receive hospital cards from the Fund until after they joined the UMW on April 25, 1955, even though Phillips Brothers had been a signatory to the contract since October 1, 1953 (974a, 979a, 982a). One employee, Arvin Hutson, had a hospital card when he went to work for Phillips Brothers in October, 1953, but he was required to turn it in after he let his UMW membership drop (976a).

The Court's attention is invited to Exhibits 138-143, the six files that the Trustees brought in, out of the thousands on file, attempting to show that pensions were awarded to non-union members. We ask the Court to consider particularly letters found in Exhibit No. 142 which perhaps illustrate more accurately than any other evidence how the Trustees have allowed the impression to permeate the industry that union membership is a prerequisite for obtaining benefits from the Welfare Fund (1699a-1700a, 1701a-1702a). Note that the first letter, dated March 19, 1958, from Bartha Mae Taylor to Mr. Lewis stresses the fact that her husband continued to pay his membership dues to the UMW, even though it was a great hardship to do so, after he lost his job in order that he would be eligible to receive benefits from the Fund. He continued to pay these dues until there was absolutely no money left. After receiving a reply from Trustee Roche, who did not enclose any application forms (1700a), Mrs. Taylor wrote to Trustee Roche a letter dated April 15,

1958 in which she went to great pains in setting out all the dues paid by her husband to the UMW after losing his job and informing Trustee Roche that her husband could not obtain application forms from his local union without first paying \$70.00 (1701a-1702a). Mrs. Taylor pleaded with Trustee Roche to send Fund application forms which was done (1702a). It finally took a letter from U. S. Representative Elizabeth Kee one year later to obtain the pension from the Welfare Fund (1706a-1707a). The pension was granted two days after Rep. Kee's letter. At no place in the file is it shown that Mrs. Taylor was advised that payment of union dues was not necessary to obtain benefits. These letters from Mrs. Taylor are examples of the letters which the Trustees were receiving as shown in the other five files. The presence of such an impression in the industry would not have been tolerated by trustees who were more interested in the welfare of the beneficiaries of the Fund than in making the Fund subservient to the purposes of the Union.

j. The Trustees have failed to clear up any understanding among the employees in the industry that UMW membership is a requirement for Fund benefits. The Trustees filed answers to interrogatories in this case in which they stated that they were not advised that there was any such broadly held view in the industry (384a). However, Mr. Mitch, General Counsel for the Fund, finally stated in his testimony that the Trustees had done what they could to clear up the impression (1091a), but no evidence whatsoever was introduced to show that the Trustees have done anything in a practical way toward clearing up this broadly held understanding that membership is a requirement for receiving Fund benefits.

k. In spite of the Trustees' insistence that the Welfare Fund pays benefits to non-Union employees of signatory operators, the Trustees produced no documentary evidence

to support this assertion. Interrogatories were addressed to the Trustees asking for information as to one non-Union employee who had ever received a pension from the Welfare Fund. This interrogatory was objected to on the ground that it was oppressive and that it would cause too much work to find such a name (368a-369a). Another interrogatory asked if there were any persons who had received a pension in the years 1956-1957 who were non-Union employees and the same objection was interposed (369a-370a). Another interrogatory asked for the name of any non-Union beneficiaries in District 19, UMW, and the same objection was interposed (371a). However, Mr. Mitch, Counsel for the Fund, testified that non-Union men are frequently awarded benefits and that there are a substantial number of these in the Trustees' files (1076a-1077a).

Finally, at the trial, and without having disclosed these to Counsel for Phillips Brothers in spite of the previous interrogatories, the Trustees introduced the six files, heretofore referred to which they claimed contained the names of non-Union beneficiaries (1033a-1043a, Exhs. 138-143). One of these files (Exhibit 141) contained an application filed November 5, 1958; another (Exhibit 142) contained an application filed May 28, 1958; and a third file (Exhibit 143) contained an application filed December 1, 1960 (1042a-1043a). The applications in all three of these files were filed after the issue was raised in this lawsuit with respect to UMW membership being a requirement for receiving benefits. For this reason the contents of these three files were never fully revealed to the jury. These files as printed in the appendix do reveal that each of these three applicants was a member of UMW when he left the industry and their letters show that each considered it necessary to explain that he was unable because of unemployment to continue paying union dues after leaving the industry (1694a-1712a).

With respect to the other three files (Exhibits 138, 139 and 140) the contention of Phillips Brothers, that UMW membership was a requirement for receiving Fund benefits, was amply shown. Exhibit 138 showed that the applicant was no longer employed in the industry but that he was a UMW member at the time he left the industry. It showed that the Trustees ignored his application until he hired an attorney and that the Trustees then turned his file over to Mr. Mitch, their General Counsel, and left the decision with him as to whether or not the pension would be awarded (1516a, 1675a-1676a). In view of the fact that no other reason that the pension should not be awarded appeared in the file, the jury was justified in its conclusion that Mr. Mitch determined that it would be better to pay the pension quietly rather than risk a lawsuit over the Trustees' refusing to pay a pension to a retired miner who had allowed his membership to drop since leaving the coal industry. Exhibit 139, the second file, revealed that the applicant was a UMW member at the time he made application for benefits (1517a-1518a, 1678a-1680a). Exhibit 140, the third file disclosed that the applicant was sent forms of the Welfare Fund requiring him to fill in blanks with respect to his Union membership and requiring certification of membership in good standing by the UMW officers. When he returned these forms to the Trustees these blanks were not filled in. The Trustees then sent these forms to the District Office of the Union to have them certify that the applicant was a member in good standing. The District then wrote to the applicant informing him that he should address the Trustees directly (1519a, 1684a-1687a). The jury was amply justified, from this series of rather involved correspondence regarding UMW membership in good standing, in reaching its conclusion that the Trustees were fully cooperating with the UMW by doing their utmost to continue the extraction of dues from unemployed miners by UMW and to discourage non-Union men in the indus-

try from applying for the benefits which they had a right to receive, and at the same time avoiding a lawsuit which might result in enlightening the men in the industry that the law requires the Trustees to pay benefits to *all* employees of a signatory operator, regardless of Union membership.

None of these files deal with the question of hospitalization benefits. They all deal with pensions. The Trustees did not even attempt to produce ~~any~~ documentary evidence that a single non-Union employee of a signatory operator ever received hospitalization benefits from the Fund (1520a).

2. Pensioners Under the Welfare Fund Have Been Organized to Carry Out UMW Activities in Accordance with the Conspiratorial Agreement.

There was ample evidence to support the jury's conclusion that the UMW effectively controls the Welfare Fund and uses this control to force the National Bituminous Coal Wage Agreement upon the small coal operators who would not voluntarily sign the agreement whose terms they cannot afford to pay; that pursuant to the terms of the conspiracy between the UMW and the large coal operators the contract has been imposed on the small operators by the use of mobs which the UMW has been able to raise by holding the benefits of the Welfare Fund over the heads of the men in the industry as an enticement. That the UMW has succeeded in organizing pensioners under the Welfare Fund into picket duty and mobs is repeatedly acknowledged by the UMW.

a. Every pension awarded by the Trustees contains the following provision in bold-faced print:

“Subject to the termination at any time by the Trustees for any matter, cause or thing of which

they shall be the sole judges and without assignment of reason therefor" (1520a).

As shown hereinabove, Mr. Lewis, Chairman of the Board of Trustees of the Welfare Fund, convinced the UMW membership, in his capacity as President of the UMW, that the law required pensioners to retain their UMW membership and the UMW Constitution has in fact so required since 1948 (290a). The jury was entitled to its reasonable conclusion that this bold-faced printed termination provision was calculated to, and did in fact, have a strong effect upon pensioners with respect to their obligation to the UMW.

b. Organized pension committees of pensioners under the Welfare Fund held regular meetings and conducted organizing drives under the guidance of the presidents of UMW Districts (422a-426a). Such activities were carried on to bring the non-Union coal miners into the UMW. (424a). Bands of one hundred to three hundred of these retired men were organized to picket and to hand out leaflets in freezing temperatures for long hours in connection with efforts to boycott power companies that bought non-Union coal (425a-426a). These retired men were organized into picket lines for as long as two years, rain or shine, hot or freezing (425a-426a).

c. The organized pensioners have been used to force the small companies to sell out to the major companies. Organized pensioners were used to force the non-Union Banner Fuel Corp. to sell out to Clinchfield Coal Corporation, Division of Pittston Company, one of the UMW's co-conspirators (426a, 692a-693a).

d. Organized pensioners have been used to boycott coal markets supporting non-Union operations. Organized pensioners were used against Monongahela Power Company to compel it to patronize Union coal mines (425a-426a).

e. The Trustees have done nothing to stop the organizing of pensioners to carry on the drudge work of organizing drives. Mr. Lewis, Chairman of the Board of Trustees, testified that he knew about the organized pensioners' activities but that he did not know about it or discuss it in his capacity as Trustee of the Welfare Fund (426a). He said that the Trustees did nothing about it (427a). Trustee Schmidt testified that the matter of organized pensioners had never been discussed by the Trustees (1059a). Mr. Mitch, General Counsel for the Trustees, who attended all of their meetings, testified that there had never been any discussion about organized pensioners in his presence (1078a). At another place in the record, Mr. Lewis testified that when this matter *was discussed* by the Trustees it was concluded that there was nothing that they could legally do to prevent the men from engaging in these activities (427a). The jury was certainly entitled to conclude that the very least that the Trustees could have done would have been to have widely disseminated to the men in the industry the requirements of obtaining benefits from the Fund, as they did prior to 1950, especially the fact (if it be a fact) that, under the Fund resolutions, UMW membership had no bearing whatsoever upon their rights to receive benefits. The Trustees certainly missed an opportunity when they failed to make this explanation to Mrs. Bob Taylor and the other applicants who wrote about union membership and the payment of dues in the six files (Exhs. 138-143). The jury was fully justified in its conclusion that, if the Trustees had been persons independent of UMW control, they would not have tolerated such unlawful use of the Welfare Fund by the UMW. The jury must have been disappointed in this attitude. The jury was fully justified in concluding that, had the Trustees been concerned with the welfare of the beneficiaries of the Fund, means would have been found, or at least discussed, of informing the

pensioners that their Fund benefits would not be affected if they chose not to join in the much publicized UMW activities which involved considerable amount of activity on the part of these elderly men in all sorts of inclement weather.

3. The Trustees Have Used Lawsuits to Collect Welfare Fund Royalties From Small Coal Companies for the Purpose of Driving Them Out of Business.

The jury reasonably concluded that the Trustees have used lawsuits, such as the case at bar, to collect Welfare Fund royalties from small coal companies for the purpose of driving them out of business pursuant to the terms of the conspiracy. The evidence on this conduct is as follows:

a. The principal occupation of the Trustees appears to be the bringing of lawsuits such as this. The trustees meet four to six times per year (1018a, 1055a), each meeting lasting from two to four hours (1019a, 1056a). The Trustees testified that up to fifty percent of their time in these meetings is devoted to considering the bringing of lawsuits for royalties (1019a, 1065a).

b. The fixed and unvarying policy of the Trustees is to collect the last cent of the royalty, regardless of the condition of the small coal company or the effect which the driving of the company into receivership or bankruptcy will have upon the beneficiaries of the Welfare Fund who are employed by these small companies. Mr. Mitch testified that there can be no settlements; the Trustees will accept only the full amount due under the contract (1073a). Trustee Schmidt testified that the policy is to collect the very last cent (1065a). This policy is absolute; the fact that such a recovery means receivership or bankruptcy for the company and unemployment for the em-

ployee beneficiaries of that company, and the fact that the royalty amounts to more than the total profits of a company for its entire life, is not a subject for discussion by the Trustees (1065a). Trustee Roche went to great pains to show that the Trustees would permit no company to pay less than the last cent (1020a-1021a).

c. The Trustees have no concern for the employees of the small companies that are put into bankruptcy or receivership. Trustee Roche testified that the lawsuits are conducted to collect the last cent, regardless of anything about the company (1020a-1021a) and that no exceptions are made for any reason (1047a-1048a). Trustee Schmidt testified that the lawsuits are pressed even though it means that the employees who have mined the coal that paid the royalties theretofore are thrown out of the industry, thereby losing their beneficiary status under the Welfare Fund (1065a). As in the case at bar, the Trustees are not concerned with the circumstances under which the individual small company came to sign the contract. The jury was, therefore, justified in its conclusion that the Trustees were cooperating with the UMW in enforcing the Welfare royalty provisions of the contract as a prime instrument of the conspiracy to drive small operators out of the industry. When the competition for the TVA coal market reached a critical stage, the Trustees brought forty one of these cases against the East Tennessee companies in rapid succession (1615a-1616a).

**4. The Trustees Have Continued to Pass Resolutions
Aimed at Keeping the Coal From Small Mines
Off the Markets.**

Since Trustee Schmidt has been on the Board of Trustees of the Welfare Fund, a resolution has been passed which bars from eligibility unemployed miners who get together and open up a small mine in order to gain a

livelihood in areas where they have become unemployed because the company which formerly employed them has gone out of business and there is no other employment available to them. There are many hundreds of these little mines over the country, many of them in Tennessee (1064a). The jury was entitled to reach the conclusion that this is just another device to keep small-mine coal off the market. A recent resolution of the Trustees was to reduce to one year the time limit for the obtaining of hospital care under the Welfare Fund by miners who have been forced out of the industry and who are unemployed (1077a-1078a).

